TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 11

LUMBERMEN'S MUTUAL CASUALTY COMPANY,
PETITIONER,

vs.

FLORENCE R. ELBERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 12, 1953

CERTIORARI GRANTED MAY 17, 1954

SUPREME COURT OF THE UNITED STATES

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 28, 1954.

[fol. a-1] [Caption omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, SHREVEPORT DIVISION

Civil Action No. 3548

MRS. FLORENCE R. ELBERT

vs.

LUMBERMAN'S MUTUAL CASUALTY COMPANY

COMPLAINT

To the Honorable Judges of the United States District Court in and for the Western District of Louisiana, Shreveport Division.

The plaintiff herein, Mrs. Florence R. Elbert, respectfully represents:

1

Petitioner is and was at all times hereinafter mentioned, a widow, a citizen of the State of Louisiana, having her residence and domicile in the Parish of Caddo, State of Louisiana, within the Western District of Louisiana, Shreveport Division.

2

The defendant herein is Lumbermen's Mutual Casualty Company, a corporate citizen of the State of Illinois, but has duly qualified to transact business in the State of Louisiana, and service of process upon it can be made through the Secretary of State, State of Louisiana, at Baton Rouge, Louisiana, its duly appointed agent for service of process.

[fol. 3] 3

The amount in controversy exceeds $3,000.00, exclusive of interest and cost; accordingly, the jurisdiction of this Court is invoked because of the diversity of citizenship between the plaintiff and the defendant.

4

Petitioner shows that at all times herein mentioned the defendant had issued, and there was in full force and effect, a policy of public liability insurance issued by the defendant to S. W. Bowen, 147 Boulevard Street, Shreveport, Louisiana, by the terms of which the defendant insured and indemnified and agreed to hold harmless the said S. W. Bowen, the members of his household, including his wife, and others operating the below described automobile with his permission, as provided for in said policy, from all claims of judgments arising out of the negligent operation of one certain 1949 Chrysler Sedan automobile owned by the said S. W. Bowen, which policy is made a part hereof by reference.

5

Petitioner shows that on or about February 21, 1951, petitioner was invited by Mrs. S. W. Bowen, wife of assured, to be her guest to take a ride with her in the aforesaid Chrysler automobile, Mrs. Bowen then and there operating the car with the permission of assured.

6

The petitioner accepted said invitation; that said Mrs. S. W. Bowen took petitioner for a ride and after having completed the same, stopped her car across the street in front of the driveway of petitioner's home, being 234 Olive Street in the City of Shreveport, Parish of Caddo, Louisi- [fol. 4] ana. Petitioner shows that the said Mrs. S. W. Bowen stopped the car to permit petitioner to alight therefrom. Accordingly, petitioner proceeded to get out of the car, stepped on the ground and proceeded to close the right front door of the car. However, before petitioner could get the door fully closed and her hand removed from the handle, the said Mrs. S. W. Bowen suddenly and without warning, started her car forward, catching petitioner's coat sleeve in the handle of the car, dragging her and throwing her violently to the ground and injuring her as hereinafter set forth.

7

The accident and resulting injuries were caused proximately by the negligence of assured's wife, aforesaid, in the following non-exclusive particulars:

a. Starting the car forward without first ascertaining that petitioner was free and clear thereof.

b. Starting the car forward while petitioner was outside thereof but in physical contact therewith.

c. Operating the car in a careless and reckless manner, under the circumstances.

8

Petitioner itemizes her injuries as follows:

a. The large bone of her upper right leg was broken and crushed where it fits into the hip joint socket.

b. Injuries of undetermined nature to the bones, muscles, nerves, blood vessels, tissues and cartilage of her

[fol. 5] 1. Upper back.
2. Lower back.
3. Both hips.
4. Both legs.

c. Aggravation and worsening of a preexisting but quiescent, dormant, non-disabling and non-painful arthritis and dislocated disc.

d. Bruises and contusions over entire body.

9

Petitioner was hospitalized from 21 February to 24 March 1951. Thereafter, she was confined to bed at her home for many months. As of now she is able to get about only with the aid of a cane.

10

She has undergone a particularly severe major operation in which an artificial, substitute bone head, made of plastic, has been fitted over the upper end of the large bone of her upper right leg. This artificial head articulates directly into her right hip joint socket.

11

She has had to have professional nursing care in and out of the hospital. Thereafter, she has had to have a non-professional attendant and will have to have such non-professional attendant the balance of her life.

12

She has suffered and will continue to suffer excruciating pain for the balance of her life.

[fol. 6]

13

Prior to the accident, petitioner was a strong, vigorous, healthy woman, engaging in all normal social, housekeeping and recreational activities.

14

At the time of her accident she was 70⅔ years of age, with a life expectancy of 8.13 years.

15

Petitioner is and will be permanently and totally disabled.

16

Petitioner itemizes her damages as follows:

Disability and loss of enjoyment and use of her physical functions to go about the normal activities of social, household and recreational life	$25,000.00
Pain and suffering	15,000.00
Attendant at $75.00 per month for 8.13 years	7,200.00
Medicine, drugs, special foods, at $20.00 per month for 8.13 years	1,920.00
Hospital bills, accrued	673.05
Doctors bills, accrued	571.13
Nursing and attendant bills, accrued	1,114.38
Medicine, ambulances, drugs, special foods, etc., accrued	111.94
Total	$51,590.50

[fol. 7] Wherefore, petitioner prays for service and citation, for jury trial of all issues, and for verdict and judgment in the sum of $51,590.50, with legal interest from date hereof, and for all general, necessary and equitable relief, and for all costs.

Sgd. John M. Madison, Slattery Bldg., Shreveport, Louisiana. Sgd. Whitfield Jack, J. M., Johnson Bldg., Shreveport, Louisiana, Attorneys for Petitioner.

In United States District Court

Motion for Production of Documents and Names of Witnesses—Filed January 3, 1952

Now, into court comes Lumbermen's Mutual Casualty Company, made defendant in the above entitled and numbered cause, and, reserving all rights under the exceptions and motions heretofore filed, and, appearing herein solely for the purpose of this motion, with respect shows:

1

That your defendant is unaware of the names and addresses of any witnesses to the occurrence of the accident out of which this suit arises other than the plaintiff and Mrs. Maggie Rodgers Bowen and, in order for your defendant to properly prepare for the defense of this action, they should be advised as to the names and addresses of all wit- [fol. 8] nesses known by the plaintiff or by plaintiff's attorneys.

2

That the plaintiff and plaintiff's attorneys have copies of medical reports reflecting the condition of the injuries and alleged disabilities of the plaintiff for which damages are being sought and in the proper preparation for the defense of this action your defendant should be furnished copies of such medical reports.

Wherefore, appearer prays that, after due consideration hereof, an order be entered herein directing the plaintiff and her attorney to furnish and submit to your appearer the

names and addresses of all witnesses having any knowledge concerning the occurrence of this accident or the alleged injuries and disabilities suffered by the plaintiff as the result thereof; and that they be further ordered to furnish your defendant with copies of all medical reports reflecting the condition and the injuries suffered by plaintiff.

Appearer further prays for all orders necessary for general and equitable relief.

Jackson, Mayer & Kennedy, Attorneys for Lumbermen's Mutual Casualty Company. Sgd. by Chas. L. Mayer, 1030 Giddens-Lane Building, Shreveport, Louisiana, Trial Attorney.

[File endorsement omitted.]

[fol. 9] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed January 3, 1952

Now into Court, comes Lumbermen's Mutual Casualty Company, made defendant in the above entitled and numbered cause, and reserving all rights under the motions and pleadings heretofore filed, with respect shows:

1

The complaint filed herein fails to state a claim against your defendant upon which relief can be granted.

2

This action as against your defendant is instituted by the plaintiff under and by virtue of the provisions of the Louisiana Revised Statutes 22:655. The provisions of said statute are procedural and are, therefore, not applicable herein.

3

That Mrs. S. W. Bowen is a resident of the State of Louisiana and plaintiff is a resident of the same state and there is no diversity of citizenship between the plaintiff and the party alleged to have committed the tort sued upon.

Wherefore, your defendant prays that, after due consideration hereof, this motion to dismiss be sustained.

Jackson, Mayer & Kennedy, Attorneys for Lumbermen's Mutual Casualty Company, Sgd. by Chas. L. Mayer, Trial Attorney, 1030 Giddens-Lane Building, Shreveport, Louisiana.

[File endorsement omitted.]

[fol. 10] IN UNITED STATES DISTRICT COURT

MOTION BY DEFENDANT TO STRIKE PLAINTIFF'S DEMAND FOR JURY TRIAL—Filed January 3, 1952

Now Into Court comes Lumbermen's Mutual Casualty Company, made defendant in the above entitled and numbered cause, and reserving all rights under the exceptions and motions heretofore filed and appearing herein solely for the purpose of this motion, with respect shows:

1

That the plaintiff herein has demanded a trial by jury of all issues.

2

That the action which has been instituted is a direct action against an insurer under and by virtue of certain statutory provisions of the State of Louisiana.

3

That under the common law there is no such direct right of action.

4

That the right of trial by jury does not exist under the constitution or statutes of the United States in matters as presented in the instant action.

5

That defendant's time to answer or otherwise move with respect to the complaint under Rule 12 of the Rules of

Civil Procedure should be extended to the disposition of this [fol. 11] motion.

Wherefore, appearer prays that, after due proceedings had, this motion be sustained and that the demand for trial by jury of all issues made by the plaintiff herein be disallowed.

Jackson, Mayer & Kennedy, Attorneys for Lumbermen's Mutual Casualty Company, Sgd. By Chas. L. Mayer, 1030 Giddens-Lane Building, Shreveport, Louisiana, Trial Attorney.

[File endorsement omitted.]

In United States District Court

Minutes of the Court—Filed February 22, 1952

This case came on for hearing on motion to strike jury demand; for production of documents and names of witnesses, and motion to dismiss for failure to state a claim, which were taken up.

Attorney for plaintiff stated that the motion for production had been complied with. The motion to strike demand for jury by defendant was overruled, and the Court [fol. 12] reserved a ruling on the motion to dismiss, and it was taken under advisement. At the request of Mr. Jack, the case was tentatively set for trial on March 19, 1952, pending the ruling on the motion to dismiss.

It was ordered that the Court be adjourned.

In United States District Court

Answer—Filed March 3, 1952

Now comes Lumbermen's Mutual Casualty Company, made defendant in the above entitled and numbered cause, and, reserving all rights under the exceptions and motions heretofore filed, with respect shows:

1

The allegations of paragraph 1 are denied for lack of sufficient information to justify a belief in same.

2

The allegations of paragraph 2 are admitted.

3

The allegations of paragraph 3 are denied.

4

The allegations of paragraph 4 are denied, except it is admitted that Lumbermen's Mutual Casualty Company issued a policy of public liability insurance to S. W. Bowen [fol. 13] and that said contract was in full force and effect and in all other respects your defendant shows that the contract of insurance is the best evidence as to the contents and provisions thereof.

5

The allegations of paragraph 5 are denied, except it is admitted that on the date referred to therein Mrs. S. W. Bowen was using said vehicle with the knowledge and consent of her husband and that petitioner had been riding in said vehicle. Your defendant shows that petitioner was being transported for the convenience and benefit of petitioner.

6

The allegations of paragraph 6 are denied.

7

The allegations of paragraph 7 are denied.

8

The allegations of paragraph 8 are denied for lack of sufficient information to justify a belief in same.

9

The allegations of paragraph 9 are denied for lack of sufficient information to justify a belief in same.

10

The allegations of paragraph 10 are denied for lack of sufficient information to justify a belief in same.

11

The allegations of paragraph 11 are denied for lack of sufficient information to justify a belief in same.

[fol. 14]

12

The allegations of paragraph 12 are denied for lack of sufficient information to justify a belief in same.

13

The allegations of paragraph 13 are denied for lack of sufficient information to justify a belief in same.

14

The allegations of paragraph 14 are denied for lack of sufficient information to justify a belief in same.

15

The allegations of paragraph 15 are denied.

16

The allegations of paragraph 16 are denied.

17

Further answering your defendant shows that the sole proximate cause of the accident out of which this suit arises was the negligence of the plaintiff, Mrs. Florence R. Elbert, in that she failed to maintain proper care and look-out for her own safety and in failing to use due care and caution in removing herself from the immediate proximity of the Bowen automobile, although she was fully aware of the fact that the vehicle was to be started in motion, and she was further negligent in failing to immediately notify the driver of the Bowen car that her clothing had become entangled in said vehicle if it should appear that the clothing had become so entangled.

18

[fol. 15] In the alternative and in the event the Court should find that the driver of the Bowen car was guilty of negligence which was a proximate cause of this accident,

then in that event your defendant shows that the negligence of the plaintiff as hereinabove outlined constituted contributory negligence such as bars recovery herein.

Wherefore, your defendant prays that, after due proceedings had, there be judgment rendered herein in favor of your defendant, Lumbermen's Mutual Casualty Company and against the plaintiff, Mrs. Florence R. Elbert, rejecting plaintiff's demands and dismissing this suit at plaintiff's costs. Defendant further prays for all orders necessary for general and equitable relief.

Jackson, Mayer & Kennedy, Attorneys for Lumbermen's Mutual Casualty Company, (Sgd.) By Chas. L. Mayer, 1630 Giddens-Lane Building, Shreveport, Louisiana, Trial Attorney.

[File endorsement omitted.]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, SHREVEPORT DIVISION

[fol. 16] Civil Action. No. 3548

MRS. FLORENCE R. ELBERT

v.

LUMBERMEN'S MUTUAL CASUALTY COMPANY

For Plaintiff: Messrs. John M. Madison, Slattery Building, Shreveport, Louisiana. Whitfield Jack, Johnson Building, Shreveport, Louisiana.

For Defendant: Charles L. Mayer, Jackson, Mayer & Kennedy, Giddens-Lane Building, Shreveport, Louisiana.

OPINION—September 3, 1952

DAWKINS, J.:

Plaintiff, a citizen of Louisiana, invoking the jurisdiction of this court solely upon the ground for diverse citizenship, sues defendant, a "corporate citizen of the State of Illinois", in tort, and for cause of action alleges:

"Petitioner shows that at all times herein mentioned the defendant had issued, and there was in full force

and effect, a policy of public liability insurance issued by the defendant to S. W. Bowen, 147 Boulevard Street, Shreveport, Louisiana, by the terms of which the defendant insured and indemnified and agreed to hold [fol. 17] harmless the said S. W. Bowen, the members of his household, including his wife, and others operating the below described automobile with his permission, as provided for in said policy, from all claims of judgment arising out of the negligent operation of one certain 1949 Chrysler Sedan automobile owned by the said S. W. Bowen, which policy is made a part hereof by reference.

"Petitioner shows that on or about February 21, 1951, petitioner was invited by Mrs. S. W. Bowen, wife of assured, to be her guest to take a ride with her in the aforesaid Chrysler automobile, Mrs. Bowen then and there operating the car with the permission of assured.

"That petitioner accepted said invitation; that said Mrs. S. W. Bowen took petitioner for a ride and after having completed the same, stopped her car across the street in front of the driveway of petitioner's home, being 234 Olive Street in the City of Shreveport, Parish of Caddo, Louisiana. Petitioner shows that the said Mrs. S. W. Bowen stopped the car to permit petitioner to alight therefrom. Accordingly, petitioner proceeded to get out of the car, stepped on the ground and proceeded to close the right front door of the car. However, before petitioner could get the door fully closed and her hand removed from the handle, the said Mrs. S. W. Bowen suddenly and without warning, [fol. 18] started her car forward, catching petitioner's coat sleeve in the handle of the car, dragging her and throwing her violently to the ground and injuring her as hereinafter set forth.

"The accident and resulting injuries were caused proximately by the negligence of assured's wife, aforesaid, in the following non-exclusive particulars:

"a. Starting the car forward without first ascertaining that petitioner was free and clear thereof.

"b. Starting the car forward while petitioner was outside thereof but in physical contact therewith.

"c. Operating the car in a careless and reckless manner, under the circumstances.

"Petitioner itemizes her injuries as follows:

"a. The large bones of her upper right leg was broken and crushed where it fits into the hip joint socket.

"b. Injuries of undetermined nature to the bones, muscles, nerves, blood vessels, tissues and cartilage of her

"1. Upper back.
"2. Lower back.
"3. Both hips.
"4. Both legs.

[fol. 19] "c. Aggravation and worsening of a pre-existing but quiescent, dormant, non-disabling and non-painful arthritis and dislocated disc.

"d. Bruises and contusions over entire body."

Her prayer is for judgment in the total sum of $51,590.50, which includes "loss of enjoyment and use of physical functions * * * pain and suffering * * * expenses of an attendant * * * medicine, drugs and special foods * * * hospital bills * * * doctors bills * * * nursing and attendant bills accrued." There is nothing alleged to show whether the maximum coverage of the policy is more or less than the total amount claimed.

Defendant has moved to dismiss the complaint, contending there is no diversity of citizenship between the real parties to the controversy as to whose fault or negligence caused the alleged injuries and consequent damages.

The sole basis for invoking the jurisdiction of the Federal court here is in the Act No. 55 of Louisiana Legislature of 1930 (now Act 541 of 1950), which reads as follows:

"No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer

from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall [fol. 20] have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person, or his or her heirs against the insurer. The insured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state."

[fol. 21] As appears from the fourth article of the complaint quoted above, the policy sued upon was not one of general liability in favor of the public, or any person who might have a claim in tort against the insured growing out of the use of the automobile covered. Nor did the insurer undertake to defend any such action against its insured, but, according to the complaint, "by the terms of the policy" the defendant undertook to "indemnify and agreed to hold harmless the said" insured and all others covered by the

policy "from the claims or charges arising out of the negligent operation of the automobile involved."

OPINION

This is one of a large number of similar suits filed in this District, which has doubled the work in the Western District within the past few years, all by citizens of Louisiana alleging that the controversy is between citizens of different states. Here, as in the others, the insured are citizens of Louisiana the same as the plaintiffs. All of them present the question of whether the State Legislature can, by authorizing a direct action against the insurer alone, at the option of complainant, impose jurisdiction upon the Federal courts in a controversy which primarily and fundamentally is one between its own citizens. The cause of action or controversy in all suits in tort in this state arises exclusively from the provisions of Article 2315 of the Louisiana Civil Code, which is also quoted in full:

> "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children, including adopted [fol. 22] children, or spouse of the deceased, or either of them, and in default of these in favor of the surviving father and mother or either of them, and in default of any of the above persons, then in favor of the surviving brothers and sisters, or either of them, for the space of one year from the death; provided that should the deceased leave a surviving spouse, together with minor children, the right of action shall accrue to both the surviving spouse and minor children; provided further, that the right of action shall accrue to the major children only in those cases where their (there) is no surviving spouse or minor child or children.
>
> "If the above right of action exists in favor of an adopted person, such right of action shall survive in case of death in favor of the children or spouse of the deceased, or either of them, and in default of these in favor of the surviving adoptive parents, or either of them, and in default of any of the above persons,

then in favor of the surviving children of the adoptive parents, or either of them, and in default of these in favor of the surviving father and mother of the adopted person, or either of them, and in default of these, then in favor of the surviving brothers and sisters of the adopted person, or either of them, for the space of one year from the death.

"The survivors above mentioned may also recover the [fol. 23] damages sustained by them by the death of the parent or child or husband or wife or brothers or sisters or adoptive parent, or parents, or adopted person, as the case may be. (As amended by Acts 1932, No. 159)".

In express terms therefore, only those whose fault causes the injury can be made to repair it. But by no stretch of the imagination can the insurer or indemnitor be said to have had any part in the tortious acts alleged in this or any other case. His undertaking is purely a matter of contract with his insured.

The jurisdiction of this court in diversity cases is conferred by the Federal Constitution and Statute. Section 2 of Article III of the Constitution provides:

"The judicial power shall extend to * * * *controversies* * * * *between citizens of different states* * * *";

and Subsection (a) of Section 1332 of Title 28, U.S.C. declares:

"'The district court shall have original jurisdiction of all civil actions *where the matter in controversy is between*:

"'(1) citizens of different states'". (Emphasis by the writer.)

To say that the Legislature of a state can confer jurisdiction upon a Federal court in a controversy which otherwise obviously it does not have, would be to concede to that body a function belonging alone to the National Congress by the simple expedient of a legislative declaration that the plain-[fol. 24] tiff, in a tort action, may sue the insurer directly and alone, in total disregard of the valid agreement between

the insured and the insurer that this should not be done, by using the accident of diverse citizenship between the complainant and the insurance company. The vast majority of insurance companies writing this kind of insurance in Louisiana are citizens of other states, and the statute otherwise provides that all provisions of the policy, other than the "no action" clause, shall be preserved and apply in any such direct action against the insurer. Liability insurance, except as to commercial operators, is not compulsory, and where the tort feasor has none, the injured person has no alternative but to sue his fellow citizen in the State court.

In Indianapolis et al v. Chase National Bank, 314 U. S. 63 the Bank, a citizen of New York, sued the Indianapolis Gas Company, the Citizens' Gas Company and the City of Indianapolis, all citizens of Indiana. The question involved was the validity of a lease by Indianapolis Gas Company to Citizens' Gas Company, insofar as the rights of the City, assignee, were concerned, since it had ultimately acquired the gas properties. It was found that inasmuch as the Indianapolis Gas Company, a citizen of the same state as the other two defendants, had to be aligned on the side of the plaintiff Bank, there was no jurisdiction in the Federal Court. The language used in emphasizing the necessity for determining the real controversy involved and the positions of the opposing parties to that controversy, it is believed has equal and forceful application to the present case. The Court first found that the lease " 'is primarily the controlling matter in dispute'. The rest is window [fol. 25] dressing, designed to satisfy the requirements of diversity jurisdiction".

That court had previously denied certiorari when the Court of Appeals had reversed the District Court in dismissing the case for lack of jurisdiction. When it went back, after trial on the merits, the District Court rendered judgment against Indianapolis Gas Company alone, but the Court of Appeals again reversed and held the other two, the Citizens' Company and the City, liable, along with the Indianapolis Company, for the interest on the bonds which the Bank was endeavoring to collect.

After stating the pleadings and issues requiring the alignment of Indianapolis Gas Company on the side of the Bank and against the other two defendants, the court first

stated, in referring to its former refusal of certiorari, that "of course, this court, by its denial of certiorari when the case was here the first time, *could not confer the jurisdiction which Congress has denied*" (emphasis by the writer.)

In dealing with the necessity for diversity on the real issue or controversy, the court said:

> "To sustain diversity jurisdiction there must exist an 'actual,' Helm v. Zarecor, 222 U. S. 32, 36, 'substantial,' Niles-Bement-Pond Co. v. Iron Moulders Union, 254 U. S. 77, 81, controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. Strawbridge v. Curtiss, 3 Cranch 267. Diversity jurisdiction cannot be conferred upon the fed- [fol. 26] eral courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.' Dawson v. Columbia Trust Co., 197 U. S. 178, 180. Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary 'collision of interests,' Dawson v. Columbia Trust Co., supra, at 181 exists, is therefore not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit,' East Tennessee, V. & G. R. v. Grayson, 119 U. S. 240, 244, and the 'primary and controlling matter in dispute,' Merchants' Cotton Press Co. v. Insurance Co., 151 U. S. 368, 385".

In holding that the actual controversy required the alignment of Indianapolis Gas Company with the Bank, the court further stated:

> "This is not a sacrifice of justice to technicality. For the question here is not whether Chase and Indianapolis Gas may pursue what they conceive to be just claims against the City, but whether they may pursue them in the federal courts in Indiana, rather than in its state courts. The fact that Chase prefers the adjudication of its claims by the federal court is certainly no reason why we should deny the plain facts of the con-

troversy and yield to illusive artifices. Settled re-[fol. 27] strictions against bringing local disputes into the federal courts cannot thus be circumvented.

"These requirements, however technical seeming, must be viewed in the perspective of the constitutional limitations upon the judicial power of the federal courts, and of the Judiciary Acts in defining the authority of the federal courts when they sit, in effect, as state courts. See Madisonville Traction Co. v. Mining Co., 196 U. S. 239, 255, and Ex parte Schollenberger, 96 U. S. 369, 377. The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, *and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts,' in order to keep them free for their distinctive federal business.* See Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483, 510; Shamrock Oil Corp. v. Sheets, 313 U. S. 100, 108-109; Healy v. Ratta, 292 U. S. 267, 270. 'The policy of the statute (Conferring diversity jurisdiction upon the district courts) calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity [fol. 28] to the judiciary sections of the Constitution . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' Healy v. Ratta, supra, at 270. In defining the boundaries of diversity jurisdiction, this Court must be mindful of this guiding Congressional policy. See Hepburn & Dundas v. Ellzey, 2 Cranch 445; New Orleans v. Winder, 1 Wheat. 91; Morris v. Gilmer, 129 U. S. 315, 328-29; Coal Company v. Blatchford, 11 Wall. 172, Shamrock Oil Corp. v. Sheets, 313 U. S. 100; and compare Old Grant v. M'Kee, 1 Pet. 248; Elgin v. Marshall, 106 U. S. 578; Healy v. Ratta, 292 U. S. 263; McNutt v. General Motors Acceptance Corp., 298 U. S. 178." (Emphasis by the Writer)

In the present case there is no separate controversy between the plaintiff and the insurance company as to its liability within the amount of its policy, once that liability on the part of the insured has been established. Until that is done, the cause of action created by Article 2315 of the Civil Code, in favor of the plaintiff, growing out of the fault constitute the "primary and controlling matters in dispute." It is true that the Court of Appeals in this Circuit, in Fisher et al. v. Home Indemnity Co., No. 13,810, decided June 30, 1952, held that the Act 55 of 1930, insofar as the insurer is concerned, deals with a substantial right in making it alone subject to a direct action without the [fol. 29] presence of its insured in the case; but that was because the Act seeks to deprive the insurer of a property right under its written contract, valid where made, in violation of the Federal Constitution, and not because either that statute or Article 2315 has made it a party, within the meaning of the Federal Diversity Laws, and the only controversy involved here is whether its insured was guilty of negligence which proximately caused the damage, a matter which the insured and insurer expressly agreed should be first determined between the former and third persons claiming the right to sue in tort. See also Lake et al v. Texas News Co., 51 F. 2d 862; Haenni v. Craven et al., 56 F. 2d 261; Cothran v. Hackel et al., 56 F. 2d 263; and Behling v. Rivers et al., 74 F. Supp. 350.

See especially State Farm Mutual Automobile Ins. Co. vs. Hugoe (4 Cir.) 115 F. 2d 298, 132 A.L.R. 188, Maryland Casualty Co. v. Boyle Construction Co., Inc., et al. (4 Cir.) 123 F. 2d 558; Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U. S. 270.

Among the cases cited by the plaintiff to sustain jurisdiction in this and the companion case of Nelson v. Clyde T. Gasperson et al., No. 3232 on the docket of this court, and also relied on rather heavily by the Court of Appeals for this Circuit in New Amsterdam Casualty Co. v. Soileau, 167 F. 2d 767, is that of Merchants Mutual Automobile Liability Insurance Co. v. Smart, 267 U. S. 126. The syllabus of that case is quoted as follows:

> "A state law (N. Y. Laws 1918, c. 182) required that any policy issued by an insurance corporation, in the

> future, to indemnify the owner of a motor vehicle against liability to persons injured through negligence in its operation, shall provide that the insolvency or bankruptcy of the insured shall not release the company from payment of damages for an injury sustained during the life of the policy, *and that, in case execution against the insured in an action brought by a person so* [fol. 30] *injured shall be returned unsatisfied because of such insolvency or bankruptcy, the injured person may maintain an action against the company on the policy for the amount of the judgment not exceeding the amount of the policy.*
>
> "Held: (1) That the regulation is reasonable, and within the police power; it cannot be said to deprive the Insurance Company of property without due process of law. * * *" (Emphasis by the writer).

It thus appears that the statute of New York there involved, unlike the present Louisiana Law, required that the controversy between the injured person and the alleged tort feasor be determined before the injured person could sue the insurer. The primary controversy between those persons there had been decided and no longer remained an issue. The only question left was the obligation of the insurer to indemnify or protect the insured, which the State Law declared should inure to the benefit of the injured person. Nothing was left to the insurer as a defense except the matters which it pleaded and these did not require the presence of the insured as a party. It is well to note also that the case had been filed in the State Court after judgment against the tort feasor was affirmed by the State Supreme Court and the matter went to the United States Supreme Court under Section 237 of the Judicial Code. The court found that "the regulation was reasonable and within the police power; it cannot be said to deprive the insurance company of property without due process of law." (The New York statute was substantially the same as Act 253 of 1918 before it was amended to permit a direct action against the insurer by Act 55 of 1930.) On [fol. 31] the other hand, as stated above, the Court of Appeals in this Circuit, in Fisher v. Home Indemnity Co., supra, has held that the Louisiana direct action statute,

which attempts to nullify stipulations in policies valid where made, by providing that the injured person, at his option, may sue the insurer directly and alone, does violate due process and the prohibition of the Federal Constitution against depriving persons of their property arbitrarily.

In discussing conditions arising from the increasing menace to life, limb and property from high-powered motor vehicles (which is now much worse than in 1924 when the decision was rendered), Chief Justice Taft said:

> "It is well settled that the business of insurance is of such a peculiar character, affects so many people and is so intimately connected with the common good that the State creating insurance corporations and giving them authority to engage in that business may, without transcending the limits of legislative power, regulate their affairs so far at least as to prevent them from committing wrongs or injustice in the exercise of their corporate functions. Northwestern Life Insurance Company v. Riggs, 203 U. S. 243, 254; Whitfield v. Aetna Life Insurance Company, 205 U. S. 489, German Alliance Insurance Company v. Kansas, 233 U. S. 389, 412, et seq.; La Tourette v. McMaster, 248 U. S. 465, 467; National Insurance Company v. Wanberg, 260 U. S. 71, 73. Such regulation would seem [fol. 32] to be peculiarly applicable to that form of insurance which has come into very wide use of late years, that of indemnifying the owners of vehicles against losses due to the negligence of themselves or their servants in their operation and use. The agencies for the promotion of comfort and speed in the streets are so many and present such possibility of accident and injury to members of the public that the owners have recourse to insurance to relieve them from the risk of heavy recoveries they run in entrusting these more or less dangerous instruments to the care of their agents. *Having in mind the sense of immunity of the owner protected by the insurance and the possible danger of a less degree of care due to that immunity*, it would seem to be a reasonable provision by the State in the interest of the public, whose lives and limbs are exposed, to require that the owner in the

contract indemnifying him against any recovery from him should stipulate with the insurance company that the indemnity by which he saves himself should certainly inure to the benefit of the person who thereafter is injured. Section 109 does not go quite so far. It provides that the subrogation shall take place only when the insured proves insolvent or bankrupt, and leaves the injured person to pursue his judgment against the insured if solvent without reliance on the policy.

[fol. 33] "Another reason for the legislation is suggested in the opinion of the Appellate Division of the Supreme Court of New York (Roth v. National Automobile Mutual Casualty Company, 202 N. Y. App. Div. 667, 674, to wit, that it was enacted on the recommendation of the State Superintendent of Insurance *to make impossible a practice of some companies to collude with the insured after an injury foreshadowing heavy damages had occurred, and to* and to *secure an adjudication of the insured in bankruptcy whereby recovery on the policy could be defeated because the bankrupt had sustained no loss.*

"Whatever the especial occasion for the enactment, it is clear that the exercise of the police power in passing it was reasonable and can not be said to deprive the Insurance Company of property without due process of law. It is to be remembered that the assumption of liability by the Insurance Company under Section 109 is entirely voluntary. It need not engage in such insurance if it chooses not to do so." (Emphasis by the Writer.)

If the court can take notice, as it did there, of the possibilities of collusion and fraud between the insurance company and its insured, no reason can be seen why the other side of the picture should not be recognized. This court had occasion a few months ago to try a case in which the alleged tort feasor (driver of a borrowed automobile) was the husband of one of the victims, a son-in-law and brother-in-law to others, and the wife of the insured owner [fol. 34] of the car was an injured passenger in the vehicle also. All signed statements shortly after the accident, the

effect of which had been to practically eliminate any negligence on the part of the driver. All of the passengers sued the insurer alone, but the driver, although injured, did not join therein for the reason that it was his alleged negligence upon which the complainants relied to recover. The defendant pleaded his failure to cooperate required as a condition of the policy, and it was only after the court had admonished him to tell the truth that he finally gave testimony in line with the statement which he made immediately after the accident. All of the others contradicted their former signed statements completely. The insurance company had no source for gaining information about the accident other than from the driver and the plaintiffs, passengers in the car. It would seem, therefore, that the danger of collusion between the insured and the injured persons is equally present and perhaps greater than between the insured and the insurer. If there is full coverage, or the prospect of collecting from the tort feasor is not encouraging, the situation constitutes an open invitation to him to aid the claimants in muleting the insurance company in consideration of their leaving him out of the case. I believe this matter requires a common sense consideration rather than a theoretical treatment *with* ignores the realities involved.

As to the cases cited as having been decided earlier by the writer, it is sufficient to say that, as frankly stated in Bayard v. Traders & Gen. Ins. Co., 99 F. Supp. 343, and Bish et ux. v. The Employers' Liability Assurance Corp. Ltd., 102 F. Supp. 343, after seeing the consequence of these former decisions and being convinced of the errors [fol. 35] committed, along with the injustice of the situation and the deluge of litigation which fell upon this court, the matter was reconsidered and subsequent cases have been decided in accordance with what is believed to be correct principles of law. This judge has been substantially sustained in some of the changed views expressed in subsequent cases by the Court of Appeals for this Circuit in Fisher v. Home Indemnity Co., supra.

In New Amsterdam Casualty Co. v. Soileau, 167 F. 2d. 767, the Court cited and relied upon the Merchants Mutual Automobile Liability Ins. Co. v. Smart, supra, which, for the reasons stated above, it is believed can clearly be distinguished from both the Soileau case and the present one

in that the original and true controversy between citizens of the same state had been settled by judgment of the State Court, leaving only the issue of the insurance company's liability under the terms of its policy. The fact that certiorari was denied did not mean that the Supreme Court approved the Soileau case, as is clearly disclosed by what happened in Indianapolis v. Chase National Bank, supra.

As to City of New Orleans v. Whitney, cited in the Soileau case as appearing on page 595 of 138 U. S., I am unable to find a case of that title, but there does appear in that volume and page the case of New Orleans v. Gaines, Administrator, and the reverse of that title. That was a case involving the rents and revenues of real property and stemming from the implied warranty which the Civil Code imposes upon all vendors when not expressly waived. In addition, there were express subrogations to support the action of the complainant. The court quoted from a former decision of the same matter in which it had been said as follows:

> [fol. 36] " 'As between the city and its grantee, the former by reason of its guaranty of title, is really the principal debtor, and bound to protect the grantee as a principal is bound to protect his surety. Therefore the grantee is entitled to such remedies as a surety hath; *and when fixed judgment*, if not before, may file a bill against his guarantor to protect him.' " (Emphasis by the writer).

It is believed there was little analogy between that case and the Soileau case. Of course, there had not been in the Soileau case, nor has there been here, any express subrogation or reduction to judgment of the claim. In fact, it arises, if at all, solely from the court's interpretation of the statute as having the effect of a legal subrogation in favor of the injured person of the rights of the insured against his insurer. It cannot be seen how such a subrogation could be created of a part only of those rights, the suing of the insurer alone, without imposing also the obligation to first liquidate the claim with the insured. Just as in Merchants Automobile Liability Ins. Co. v. Smart, supra, the claim in Gaines had been established against the obligor.

American Surety Co. v. Louis State Bank, 8 F. 2d 559,

is not at all similar to the present case. There the non-resident surety, who sued to be reimbursed, had paid its bond and taken a formal subrogation from its principal, the State. The court upheld the jurisdiction in an action by the surety against the Bank, based upon its negligence. The remaining cases of the Fifth Circuit seem to be distinguishable for similar reasons.

[fol. 37] For the reasons indicated, the motion to dismiss should be sustained.

Proper decree should be presented.

Done and signed in Chambers, at Monroe, Louisiana, this 3d day of September, 1952.

Sgd. Ben C. Dawkins, Judge.

[File endorsement omitted.]

In United States District Court

Motion for Rehearing on Defendant's Motion to Dismiss—Filed September 13, 1952

Now comes complainant and moves this Court for a rehearing on defendant's Motion to Dismiss and this Court's written opinion dated 3 September 1952, filed 4 September 1952, sustaining that Motion, and finally for an order granting a rehearing thereon and denying said Motion, in view of the unreported opinion in Gushing v. Maryland Casualty Company, decided by the Fifth Circuit on appeal from the Eastern District of Louisiana.

Wilkinson, Lewis & Wilkinson, Sgd. by John M. Madison, W.J. Booth, Lockard & Jack, Sgd. by [fol. 38] Whitfield Jack, attorneys for complainant.

[File endorsement omitted.]

In United States District Court

Stipulation Re Residence Of Parties—Filed September 27, 1952

It is stipulated between complainant, through undersigned counsel, and defendant, through undersigned counsel, as follows:

a. Complainant and assured were both citizens of and residing within the State of Louisiana at the time the policy sued upon was applied for, at the time that the policy sued upon was issued, and at the time of the accident which forms the basis of this suit, and both of said parties are still citizens of and living in Louisiana.

b. Defendant is now a citizen of Illinois, authorized and doing business in Louisiana, and was such and so authorized when the policy sued upon was applied for and issued and when the said accident occured.

c. The application for and the issuance of the insurance policy sued upon occurred in Louisiana.

d. The accident which gives rise to this suit occurred in Louisiana.

[fol. 39] e. Attached hereto and made a part hereof is a true and correct photostatic copy of the policy sued upon.

This stipulation agreement is made to be filed in the records of this case and to be binding upon the complainant and defendant.

Wilkinson, Lewis & Wilkinson, Sgd. by John M. Madison, Slattery Bldg., Shreveport, La.; Booth, Lockhard & Jack, Sgd. by Whitfield Jack, Johnsen Bldg., Shreveport, La., atiorneys for complainant; Jackson, Mayer & Kennedy, Sgd. by Charles L. Mayer, Giddens Lane Bldg., Shreveport, La., attorneys for defendant.

[File endorsement omitted.]

Note: Photostat copy of insurance policy attached to Stipulation Filed September 27, 1952 is being sent up in its original form.

In United States District Court

Minutes Of The Court—September 29, 1952

[fol. 40] This case came on for hearing on plaintiff's motion for re-hearing on defendant's motion to dismiss. The motion was argued, submitted and is to be taken under advisement. A short memorandum will be furnished by the defense attorney.

Court ordered adjourned.

In The United States District Court For The Western District Of Louisiana, Shreveport Division

* * * * * * *

Civil Action

No. 3548

Mrs. Florence R. Elbert

v.

Lumberman's Mutual Casualty Company

* * * * * * *

For plaintiff: Messrs. John M. Madison, Slattery Building, Shreveport, Louisiana; Whitfield Jack, Johnson Build-
[fol. 41] ing, Shreveport, Louisiana.

For defendant: Charles L. Mayer, Jackson, Mayer & Kennedy, Giddens-Lane Building, Shreveport, Louisiana.

* * * * * * *

Dawkins, J.:

Opinion On Motion For Rehearing—October 30, 1952

Plaintiff has sought a rehearing in this case because of the decision of the Court of Appeals for this Circuit in Cushing et al. v. Maryland Casualty Company, No. 13,887, decided on July 31, 1952.

In that case, jurisdiction was invoked under both Section 33 of the Merchant Marine (Jones) Act of 1920, and Section 655 of Title 22 of the Louisiana Revised Statutes, usually called the direct action law. The suits were by the beneficiaries of deceased seamen who lost their lives in a collision by a tug owned by their employer with a railroad bridge belonging to the Texas & Pacific Railway Company. Defendants were the Railroad and the insurers, alone, against liability of the owners of the tug for injury and death of seamen. This insurance policy also covered death by accidental means and applied solely to the employees of the owner of the tug. The complainants charged negligence on the part of the operators of both the tug and the bridge.

The trial court sustained a motion to dismiss the demands against the insurance companies under the State Direct Action Statute, on the ground that the matter was cognizable solely, in admiralty jurisdiction and the State [fol. 42] law did not apply. The Court of Appeals reversed that ruling, stating the issues as follows:

> "The dominant question is whether or not the statute (Sec. 655 La. Rev. Stat. of 1950) applies to policies which protect the owner and charterer of a vessel against liability for *personal injuries or accidental death suffered by the crew of a vessel in navigable waters.*" (Emphasis by the writer.)

In disposing of the case, the Court, among other things, said:

> "While Sec. 655, supra, confers upon an injured party a *substantive* right which becomes vested at the moment of the injury, it is not a right essentially maritime in character * * *. The statute provides *only an additional and cumulative remedy* at law in the enforcement of obligations of indemnity voluntarily and lawfully assumed by the insurer" and that it "does not conflict with any feature of substantive admiralty law, nor with any *remedy* peculiar to admiralty jurisdiction. These suits are at law, not in admiralty." (Emphasis by the writer.)

It is hard to understand how a law can confer "a substantial right" and yet provide "*only* an additional and cumulative remedy." In Fisher v. Home Indemnity Company, decided June 30, 1952, the same Court of Appeals, with Judge Hutcheson as its organ, had held that Sec. 655 created a substantial right, not a remedy, insofar as it attempted to give a direct action against the insurer alone, [fol. 43] the enforcement of which as to contracts validly made in other states would violate the Federal Constitution.

Further on in the Cushing case, it is said:

> "Appellees, the insurers, further contend that the Jones Act, 46 E. S. C. A. 688, *creates a right of action against an injured seaman's employer, but not against the employer's liability underwriter*, and that the State of Louisiana can not add to the rights created by the Jones Act. It is unnecessary, however, to determine that question. Even if there were no jurisdiction, or any right of action, under the Jones Act, which we do not decide, diversity of citizenship exists between all plaintiffs and the defendant insurers, and more than $3,000.00 is involved in each suit. *These circumstances support federal jurisdiction. The complaints contain averments which sufficiently assert liability upon general principles of negligence, and also for accidental death within the coverage of the policies sued upon, so that a cause of action is stated.*" (Emphasis by the writer.)

Actions for death were unknown to the common law. In Louisiana the right to sue for personal injuries or death is purely statutory, and the liability created is confined to the person or persons at fault. The insurer, or persons secondarily liable, are not included, nor does Sec. 655 purport to make it an additional tort feasor. It simply authorizes the injured person or his heirs, at their option, to bring a direct proceeding against the insurer alone or against [fol. 44] the insurer and insured together on the one cause of action created by the Code, and otherwise specifically preserves all other terms of the policy. Therefore, any such suit by a third person against the insurer must necessarily arise from an implied subrogation to the rights of

the insured under his policy to demand of the insurer that it discharge his liability once it is established. Certainly the insured himself has no cause of action to sue his insurer until the controversy as to whose fault, under Art. 2315 of the Civil Code, caused the injury, is determined; nor can that right of action of the subrogee, the injured person, it would seem, rise any higher than that of the insured, that is, to require payment by the insurer of the judgment against the insured.

In Maryland Casualty Co. v. Pacific Coal & Oil Co. et al., 312 U. S. 270, the court stated the circumstances as follows:

> "Petitioner issued a conventional liability policy to the insured, the Pacific Coal & Oil Co., in which it agreed to indemnify the insured for any sums the latter might be required to pay to third parties for injuries to person and property caused by automobiles hired by the insured. Petitioner also agreed that it would defend any action covered by the policy which was brought against the insured to recover damages for such injuries.
>
> "While the policy was in force, a collision occurred between an automobile driven by respondent Orteca and a truck driven by an employee of the insured. [fol. 45] Orteca brought an action in an Ohio State court *against the insured* to recover damages resulting from injuries sustained in this collision. Apparently this action has not proceeded to judgment.
>
> "Petitioner then brought this action against the insured and Orteca. Its complaint set forth the facts detailed above and further alleged that the time of the collision the employee of the insured was driving a truck sold to him by the insured on a conditional sales contract. Petitioner claimed that this truck was not one 'hired by the insured' and hence that it was not liable to defend the action by Orteca against the insured or to indemnify the latter if Orteca prevailed. It sought a declaratory judgment to this effect against the insured and Orteca, and a temporary injunction restraining the proceedings in the state court pending final judgment in this suit." (Emphasis by the writer.)

Orteca demurred on the complaint on the ground that it did not "state a cause of action against him", which was sustained by the trial court and affirmed by the Court of Appeals in 11 Fed. 2d. 214. In disposing of the matter, the Supreme Court said:

> "The question is whether petitioner's allegations are sufficient to entitle it to the declaratory relief prayed in its complaint. This raises the question whether there is an '*actual controversy*' within the meaning of the Declaratory Judgment Act (Judicial [fol. 46] Code § 274d, 28 U. S. C. § 400), since the District Court is without power to grant declaratory relief unless such a controversy exists. Nashville, C. & St. L. Ry. Co. v. Wallace, 288 U. S. 249, 259; U. S. C. A. Constitution, Art. III, § 2.
>
> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determing in every case whether there is such a controversy. *Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interest, of sufficient immediacy and reality* to warrant the issuance of a declaratory judgment. See Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 239-242. *It is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case.* Nashville C. & St. L. Ry. Co. v. Wallace, supra, p. 261.
>
> "That the complaint in the instant case presents such a controversy is plain. Orteca is now seeking a judgment against the insured in an action which the latter claims is covered by the policy, and §§ 9510-3 and 9510-4 of the Ohio Code (Page's Ohio General Code, Vol. 6, §§ 9510-3, 9510-4) *give Orteca a statutory* [fol. 47] *right to proceed against petitioner by supplemental process and action if he obtains a final judgment against the insured which the latter does not satisfy within thirty days after its rendition.* Com-

pare Maryland Casualty Co. v. United Corporation, 111 F. 2d. 443, 446; Central Surety & Insurance Corp. v. Norris, 103 F. 2d. 116, 117; U. S. Fidelity & Guaranty Co. v. Pierson, 97 F. 2d. 560, 562. Moreover, Orteca may perform the conditions of the policy issued to the insured requiring notice of the accident, notice of suit, etc., in order to prevent lapse of the policy through failure of the insured to perform such conditions. Hartford Accident & Indemnity Co. v. Randall, 125 Ohio St. 581; 183 N. E. 433; see also, Lind v. State Automobile Mutual Insurance Assn., 128 Ohio St. 1; 190 N. E. 138; State Automobile Mutual Insurance Assn. v. Friedman, 122 Ohio St. 334; 171 N. E. 591.

"It is clear that there is an actual controversy between petitioner and the insured. Compare Aetna Life Ins. Co. v. Haworth, supra. If we held contrariwise as to Orteca because, as to him, the controversy were yet too remote, it is possible that opposite interpretations of the policy be announced by the federal and state courts. For the federal court, in a judgment not binding on Orteca might determine that petitioner was not obligated under the policy, while the state court, in a supplemental proceeding by Orteca [fol. 48] against petitioner, might conclude otherwise. Compare Central Surety & Insurance Corp. v. Norris, supra, p. 117; Aetna Casualty & Surety Co. v. Yeatts, 99 F. 2d. 665, 670." (Emphasis by the writer.)

Of course, the real controversy in that case, as between the insurer and the injured person, Orteca, was not whose fault caused the accident but whether the policy covered it as contended by both Orteca and the insured, and that was the sole basis upon which the Supreme Court rested its conclusion that a federal court had jurisdiction under the declaratory judgment statute (Sec. 400, Tit. 28 U.S.C.), between citizens of different states. Hence, without that issue of coverage, it seems clear that the court would have ruled otherwise. The effect of the decision is that the insurer could not have maintained the suit for declaratory judgment against Orteca alone upon the controversy as to liability between him and the insurer as such, without this

allegation of non-coverage, wherein it contended the terms of its policy did not obligate it to defend or to indemnify the insured under the facts which were charged in the complaint for the declaratory judgment. If the insurer in a suit wherein there was unquestioned diversity between it and the injured person could not maintain a cause of action independently and alone against the latter, because of the absence of any real controversy between it and the insured, how can it be said that the injured person could invoke federal jurisdiction against the insurer alone on the same state of facts? Could there be any "actual controversy" in the one instance and not in the other?

The Court of Appeals for the Fourth Circuit, with Chief [fol. 49] Judge Parker as its organ, had occasion to decide a closely related question in two well considered cases, to wit: State Farm Mutual Automobile Ins. Co. v. Hugee, 115 Fed. 2d 298, 132 A.L.R. 188, and Maryland Casualty Co. v. Boyle Const. Co., 123 Fed. 2d 558. In the first of these, Hugee's case, the plaintiff insurance company brought an action for a declaratory judgment, in circumstances stated by the court as follows:

> "Plaintiff is an insurance company of the State of Illinois. It had issued a policy of automobile liability insurance to Patton's, Inc., one of the defendants, a South Carolina corporation, operating a laundry in that state. The policy covered a laundry truck of Patton's while being operated for commercial purposes, and one of its clauses provided that plaintiff would defend any suit for damages against Patton's arising out of the operation of the truck, even though such suit should be 'groundless, false or fraudulent'. Other defendants are citizens of South Carolina who were injured in a collision between the truck and a bus, the driver of the bus, the bus companies which owned and operated the bus, and the administrator of the truck driver, who was killed in the collision.
>
> "The complaint as amended alleged that the truck was not being operated for commercial purposes at the time of the collision but was being operated by the driver, one McRae, 'for purposes purely personal to himself'; that claims for damages arising out of the

collision were not within the coverage of the policy for [fol. 50] that reason; that Patton's had demanded that plaintiff defend any claims made against it in connection with the collision; that claims had been filed against Patton's by persons injured; that suits were about to be brought on the claims against Patton's and that in the event of recovery in these suits claims would be made against plaintiff under the policy. It is alleged also that plaintiff would be required to employ counsel to defend the suits against Patton's and averred that the court was empowered under the Declaratory Judgment Act 'to determine herein, for the benefit of all parties plaintiff and defendant, whether in fact and in law, at the time of the aforementioned incident (accident), the defendant, Patton's, Inc., is liable to the other defendants herein or any of them, and, accordingly whether, under the same facts and circumstances, any liability attaches under the terms of plaintiff's policy to the defendant, Patton's Inc., and to the other defendants and in that regard the plaintiff alleges that under a proper construction of the terms of its aforesaid policy, under the facts above set forth, no liability under said policy exists, and that this plaintiff should not be put to the expense of litigating said question in the numerous individual suits that will be brought against Patton's, Inc., and against the representatives of the McRae estate involving that identical issue, but that said issues should be adjudicated herein and the question [fol. 51] of the plaintiff's liability under the terms of its aforesaid policy should be declared in this cause.' "

There the plaintiff also raised the question of coverage of its policy, but made its insured a party, and the latter joined in the claim that there was no coverage. It became necessary to align the insured on the same side as the plaintiff, and other defendants, being citizens of the same state, there was no diversity as between all plaintiffs and defendants, and it was dismissed for want of jurisdiction. Whereas, in the Maryland Casualty Co. v. Pacific Coal & Oil Co., there was an issue between the insurer and insured as to whether the latter was protected by the policy. After

citing and reviewing numerous authorities, Judge Parker said:

> "A case such as this is to be distinguished from *one where there is a bona fide controversy between the non-resident insurance company and the insured, and where one holding a claim against the insured is brought in for the purpose of securing a complete settlement of the entire controversy. In such case the non-resident company is entitled to invoke the jurisdiction of the federal courts for the purpose of settling the controversy with the resident insured; and the fact that another resident may be joined for the purpose of obtaining a complete settlement of the controversy does not oust the jurisdiction.* Such a case was before this court in Aetna Casualty & Surety Co. v. Yeatts, 4 Cir., 99 F. 2d 665, where there was a controversy between the company and the insured which would not [fol. 52] necessarily be decided in a suit between the claimant and the insured and where the interests of the company and the insured would be diverse in defending a suit instituted by the claimant. Such a case also was Farm Bureau Mutual Automobile Ins. Co. v. Daniel, 4 Cir., 92 F. 2d 838, where there was a bona fide controversy between the company and the insured and another company as to the coverage of the policy. *Very different is the case where, as here, the interest of the insurer in the litigation is identical with that of the insured and where there is no bona fide controversy of any sort between them. The liability of the insurer to the insured manifestly does not constitute a controversy where the insurer admits it; and the insurer may not use that liability as a means of trying in the federal court litigated claims which it has obligated itself to defend and which are properly cognizable in state tribunals.* Cf. Steele v. Culver, supra. To quote again the language of Mr. Justice Holmes in that case, "It seems * * * strange to suggest that a contract of a stranger with a stranger can affect the interest of the party immediately concerned." (Emphasis by the writer).

In the second case, Maryland v. Boyle, supra, the situation was identical with Hugee, and the following is quoted:

> "As we pointed out in the Hugee case, if there were a bona fide controversy between plaintiff and the in- [fol. 53] sured, a different situation would be presented; for in such case the basis for a realignment of parties would be absent. If, for example, there were a bona fide controversy over the meaning or coverage of the policy or over the question of its validity or expiration, it would no doubt be proper to invoke the power of the court to render a declaratory judgment against the insured and to join the claimant against the insured as a party defendant, so that there might be a complete settlement of the controversy. Of course the plaintiff has a justiciable controversy with the claimant, and there is diversity of citizenship between plaintiff and the claimant; *but insured is an indispensable party* to any suit to settle that controversy *(Steele v. Culver,* 211 *U.S.* 26, 29 *S. Ct.* 9, 53 *L. Ed.* 74) *and the joinder of insured defeats the jurisdiction, since its interest in the controversy is identical with that of plaintiff and it is a citizen of the same state as the claimant.*" (Emphasis by the writer).

In Steele v. Culver, 211 U.S. 26, the plaintiff corporation sued to annul a judgment against itself and its principal on a bond in the State Court wherein complainant had become the surety on appeal. The ground for annulling the judgment was that it had been obtained by fraud. The principal, or defendant in the judgment in the State Court, was made a party, but there was no prayer for relief against it. In disposing of the matter, the court had this to say:

> "It is suggested that the controversy as to the [fol. 54] judgment against the Security Company is separable, and that relief may be given against that at least without the presence of the railroad. But the only ground on which that judgment is complained of is that *that* against the railroad, upon which it is based, was obtained by perjury and fraud. So long as the judgment against the railroad stands, that against its

surety cannot be impeached. By its bond the surety undertook to pay the judgment, if rendered, against its principal, whether right or wrong. If the principal remains liable under that judgment the surety is bound to pay. Krall v. Libbey, 53 Wisconsin, 292; Piercy v. Piercy, 1 Iredell Eq. 214, 218. *But the principal cannot be relieved by a proceeding behind its back.*" (Emphasis by the writer).

In a case like the present, brought on the authority of the State statute (Sec. 655, R.S. Tit. 22), if the insurer is either condemned or relieved of liability, it would be in a "proceeding behind the back" of the insured, involving a controversy wherein his negligence or that of his agents was the sole controversy; yet any such judgment could not be enforced against him, except in a new suit, if the insurer by chance became insolvent and unable to pay. It would seem, therefore, that the insured, for this reason also, is an indispensable party to any suit to establish his liability, which first must be done before the insurer can be forced to pay. Otherwise the real controversy or issue of negligence on the part of the insured remains undetermined as to him.

[fol. 55] Other considerations under the Louisiana law appear to demonstrate that the real controversy is between the complainant and the tort feasor. It often happens that the injured person is covered by compensation insurance. If he is injured or killed in the course of his employment, such as driving his employer's vehicle, the compensation insurer pays the compensation. In such instances, *the law of the State permits the compensation* insurer (who is not included in Sec. 655 as having a direct action against the insurer of the tort feasor) to intervene in a suit by the employee against the alleged tort feasor for reimbursement out of any recovery, for payments so made. The basic right of action by the injured person is, as stated, legal subrogation to the right of the insured to require the insurer to pay, to the extent of its policy, after it has been found that the insured's fault caused the damage. This right of the compensation insurer to maintain its action also arises from legal subrogation to the rights of the employee against the third person, not his in-

surer, who is guilty of negligence. Thus, we find the compensation insurer, in a suit against the insurer alone, asserting a subrogation to the subrogation of the compensation employee to the contractual rights of the insured third person against his own insurer under his policy. Since those contractual rights do not become enforceable until his liability has been judically established, it seems clear that the real controversy which this court is called upon to decide is that between the complainant and the third person whose fault he alleges caused his damage. *No one can recover in such an action until the issue of fault or negligence*, as between the injured person or his employer, where the latter's vehicle is also involved, and the third [fol. 56] person, has been determined; yet this optional direct action statute attempts to substitute the foreign insurer alone, in the place of the third person alleged tort feasor. To defend such a suit, the insurer not being present when the accident occurs and having no information of its own, must depend upon its insured or his agents as to the facts. Feeling secure under the protection of his insurance, the insured is not actuated by the compulsion of vigilance of one faced with the risk of a large judgment against himself. See Merchants Mutual Automobile Liability Ins. Co. v. Smart, 267 U.S. 129. In other words, the insurer is forced to take over and defend, alone, the conduct of its insured in a controversy to which it is not the real party, and in a proceeding which entirely ignores the wrong-doer.

Further circumstances appear to demonstrate that the real controversy is between the complainant and the tort feasor. If it transpires that the employer of the complainant, in the situation just described, has suffered property loss as a result of the same accident in which the employee was injured or killed, and for which the insurer of the third person has been sued, is not joined in the suit, there is nothing to prevent him from bringing his own independent action against such third person, or his insurer, which would again involve the identical controversy as to fault. On the other hand, if the injured person were required to sue the actual wrong-doer instead of his insurer, the controversy as to whose negligence caused the accident could

be determined finally in a single action as to all of those concerned.

Again, the courts of Louisiana have held that if the injured person sees fit to sue a single alleged tort feasor or [fol. 57] his insurer, as they often do, where two or more persons or their insurers are involved, the one so sued, or his insurer, cannot bring in the others or have recourse against their insurers until he has been condemned and has paid the whole judgment, thus necessitating another suit for contribution. Yet, if the Federal Court has unquestioned jurisdiction of the actual controversy, the Rules of Federal Procedure expressly provide for the bringing in of such other wrong-doers as third parties defendant for the settlement of the rights of all concerned at one time.

It is also well to call attention to the well known fact that in most of these suits in the Federal Courts of this State, the complainants allege damages greatly in excess of the maximum limits of the policies sued upon. The reason is obvious. The complainant wishes to impress the jury that he is sufficiently protected and should recover at least the full amount of the policy. Yet these suits are often filed against the insurer alone where the insured is financially able to respond in an amount exceeding the insurance, but, nevertheless, the action is brought against the insurer alone and the complainant thereby waives the right to pursue the alleged wrong-doer thereafter.

Sec. 655 of Title 22, R.S., not only gives the injured person the option to sue the insurer of the alleged wrong-doer, it also permits him to sue the insured alone, or with his insurer in a single action as he sees fit. In any event, no matter who he names among these three choices as the party or parties defendant, it is the same cause of action which is created by the Article 2315 of the Code. As before stated, the only parties to that controversy, under this codal provision, in any case, are the injured party and [fol. 58] the alleged wrong-doer, and since jurisdiction in the Federal Court, based upon diversity of citizenship, means the citizenship of the real parties to the controversy, the presence of the alleged tort feasor as the defendant is indispensable in any such action brought in this court to determine responsibility for the accident.

Finally, as sustaining the idea that it was never intended that citizens of the state in which the suit is brought should have the right to invoke the jurisdiction of the Federal Courts, on the ground of diverse citizenship, is the rule settled by statute and decisions that when sued by a non-resident, these citizens of the State cannot remove their cases to this court. Glover Machine Works v. Cook Jellico Coal Co., 222 F. 53; Sheets, et. al. vs. Shamrock Oil & Gas Co., 115 Fed. 2d 880, (5th Cir.) 313 U.S. 100. The plaintiff has but one cause of action no matter how many persons were involved or responsible for the accident. Bentley v. Halliburton Oil Well Cementing Co., 174 F. 2d 788.

The re-hearing is denied.

Done and signed in Chambers, at Shreveport, Louisiana, this 30 day of October, 1952.

Sgd. Ben C. Dawkins, Judge.

[File endorsement omitted.]

[fol. 59] In United States District Court

Judgment—Filed October 31, 1952

Defendant's Motion to Dismiss having been argued and briefs submitted, the Court having heretofore rendered a written opinion directing the presentation of proper decree sustaining said Motion to Dismiss, plaintiffs having moved for a rehearing thereon and having submitted briefs in support thereof, the Court being of the opinion that said Motion to Dismiss should be sustained.

It is ordered, adjudged and decreed that the defendant's Motion to Dismiss for lack of jurisdiction is hereby sustained and the Motion for Rehearing thereon is denied, and accordingly the demands of the complainant as set forth in her complaint are dismissed all at the cost of the complainant.

Shreveport, Louisiana, 31 October, 1952.

Sgd. Ben C. Dawkins, United States District Judge.

Approved as to form, Wilkinson, Lewis & Wilkinson, Sgd. by John M. Madison, attorneys for complainant.

[File endorsement omitted.]

[fol. 60] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed October 31, 1952

To the United States Court of Appeals, Fifth Circuit, New Orleans, Louisiana:

Notice is hereby given that Mrs. Florence R. Elbert, complainant-appellant, does hereby appeal to the United States Court of Appeals, for the Fifth Circuit, New Orleans, Louisiana, from the judgment rendered, filed and signed in this case by the Hon. Ben C. Dawkins, presiding trial Judge, on 31 October, 1952, sustaining and granting defendant's Motion to Dismiss for want of jurisdiction and overruling and denying complainant's Motion for a rehearing thereon.

Shreveport, Louisiana, 31 October, 1952.

Sgd. John M. Madison, Slattery Building, Shreveport, Louisiana; Sgd. Whitfield Jack, Johnson Building, Shreveport, Louisiana.

[Certificate of Service omitted in printing.]

[fol. 61] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

REQUEST THAT RECORD ON APPEAL BE PRINTED PRIOR TO TRANSMISSION TO UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT—Filed October 31, 1952.

To the Clerk of this Honorable Court:

Request that the entire record on appeal be printed prior to transmission to the United States Court of Appeals, Fifth Circuit, by R. T. Russ, Court Reporter, in compliance with Rule 23 (10) of the said Circuit Court of Appeals.

Shreveport, Louisiana, 31 October, 1952.

Sgd. John M. Madison, Slattery Building, Shreveport, Louisiana; Sgd. Whitfield Jack, Johnson Building, Shreveport, Louisiana, attorneys for complainant-appellant.

[File endorsement omitted.]

[fol. 62] IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS ON WHICH THE COMPLAINANT-APPELLANT INTENDS TO RELY UPON APPEAL—Filed October 31, 1952

Now comes complainant-appellant and shows that the points upon which she intends to rely on the appeal of this case to the United States Court of Appeals, Fifth Circuit, are as follows:

1. The Court erred in sustaining and granting defendant's Motion to Dismiss for lack of jurisdiction.

2. The Court erred in overruling complainant's Motion for a Rehearing on defendant's Motion to Dismiss for Lack of Jurisdiction.

Shreveport, Louisiana, 31 October, 1952.

Sgd. John M. Madison, Slattery Building, Shreveport, Louisiana; Sgd. Whitfield Jack, Johnson Building, Shreveport, Louisiana, attorneys for complainant-appellant.

[File endorsement omitted.]

[fol. 63-65] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF APPEAL RECORD—Filed October 31, 1952

Complainant-appellant designates and requests that the Clerk of this Court include the following in the appeal record:

1. The entire, complete record, including every pleading, every stipulation, the minutes of Court, all opinions of the Court, the bond, notice of appeal and all filings of any nature whatsoever.

2. Additionally, but not exclusively all of those things listed in Rule 75 (g) of the Federal Rules of Civil Procedure.

Shreveport, Louisiana, October 31, 1952.

Sgd John M. Madison, Slattery Building, Shreveport, Louisiana. Sgd. Whitfield Jack, Johnson Building, Shreveport, Louisiana, attorneys for complainant-appellant.

[File endorsement omitted.]

Bond on appeal for $250.00 filed November 1, 1952, omitted in printing.

[fol. 66] IN UNITED STATES DISTRICT COURT

MOTION AND ORDER TO SEND POLICY UP ON APPEAL AS ORIGINAL DOCUMENT—Filed November 5, 1952

Now comes complainant-appellant and moves the Court for an order directing the Clerk of this Court to send the policy of insurance filed in this case as an original document to the Court of Appeals, Fifth Circuit, along with the Transcript of Record on Appeal, showing that the arrangement of the policy and the several sizes of type make it difficult and expensive to reproduce by printing, and

further showing that the stipulation in the case renders the policy itself of little relative importance.

Wilkinson, Lewis & Wilkinson, Slattery Bldg., Shreveport, La.; Booth, Lockard & Jack, Sgd. by Whitfield Jack, Johnson Bldg., Shreveport, La., attorneys for complainant.

ORDER

The Clerk is directed to send the policy of insurance in this case as an original document to the Court of Appeals, Fifth Circuit, along with the Transcript of Record on appeal.

Shreveport, Louisiana, November 5, 1952.
Sgd. Ben C. Dawkins, United States District Judge.

[File endorsement omitted.]

[fol. 67] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 68] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:—

ARGUMENT AND SUBMISSION.

Extract from the Minutes of January 7, 1953.

No. 14353

MRS. FLORENCE R. ELBERT,

versus

LUMBERMAN'S MUTUAL CASUALTY COMPANY.

On this day this cause was called, and after argument by John M. Madison, Esq., and Whitfield Jack, Esq., for appellant, and Chas. L. Mayer, Esq., for appellee, was submitted to the Court.

[fol. 69] OPINION OF THE COURT—

Filed January 29, 1953.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14353

MRS. FLORENCE R. ELBERT,

Appellant,

versus

LUMBERMAN'S MUTUAL CASUALTY COMPANY,

Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(January 29, 1953.)

Before Hutcheson, Chief Judge, and Strum and Rives, Circuit Judges.

PER CURIAM: Brought under the provisions of Louisiana Revised Statutes 22:655, the Louisiana Direct Action Statute, against the insurer in an automobile liability policy issued by it to one S. W. Bowen, and covering the members of his household, the suit was for damages sustained by plaintiff as the result of the alleged negligence of Mrs. Bowen, the driver of the car.

[fol. 70] The defendant moved to dismiss the action on the ground that the complaint fails to state a claim against defendant upon which relief can be granted, and that there is no diversity of citizenship between the plaintiff and Mrs. Bowen, the real party in interest as defendant.

The district judge, in a detailed opinion,[1] fully discussing the reasons presented for and against the motion, and canvassing the applicable authorities, concluded, contrary to the contention of plaintiff, that the question presented for decision was not foreclosed by our cases[2] but was still open to him. So concluding, he sustained the motion and dismissed the action.

Plaintiff is here insisting that upon principle and authority, and particularly upon that of our cases cited in the note, the judgment was wrong and must be reversed.

We agree. The judgment is, therefore, reversed and the cause remanded for further and not inconsistent proceedings.

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[1] Elbert v. Lumbermen's Mutual Cas. Co., 107 Fed. Supp. 299. Cf. to the contrary Lewis v. Manufacturers Cas. Ins. Co., 107 Fed. Supp. 465.

[2] New Amsterdam Cas. Co. v. Soileau, 167 F. (2) 767; Fisher v. Home Indem. Co., 198 F. (2) 218; and Cushing v. Maryland Cas. Co., 198 F. (2) 536.

[fol. 71] JUDGMENT.

Extract from the Minutes of January 29, 1953.

No. 14353

MRS. FLORENCE R. ELBERT,

versus

LUMBERMAN'S MUTUAL CASUALTY COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that said cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, Lumberman's Mutual Casualty Company, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 71] IN UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

PETITION FOR REHEARING—Filed February 18, 1953

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Now into court comes Lumbermens Mutual Casualty Company, appellee in the above entitled cause, and presents this petition for rehearing and, in support thereof, respectfully represents that the Court erred in its [fol. 72] opinion and decree rendered January 29, 1953, in the following matters, to-wit:

1

That this Court has erred in giving such effect to an act of the legislature of the State of Louisiana as results in citizens of Louisiana being afforded an unfair and prejudicial advantage over non-resident litigants by invoking the jurisdiction of this Court on the grounds of diversity of citizenship, which basis of jurisdiction in the federal courts was created for the sole purpose of protecting non-resident litigants from discrimination in favor of resident litigants.

2

That the Court erred in not recognizing that the only *cause* of action under the laws of Louisiana, as distinguished from a right of action, existing in favor of an injured party as the result of the negligence of another is that which is created under the provisions of Article 2315 of the Civil Code of the State of Louisiana, which provides:

> "Every act whatever of man that causes damage to another, obliges *him* by whose fault it happened to repair it * * *" (emphasis ours).

and that under these provisions the only *cause* of action which actually exists in the instant matter is that which the plaintiff and appellant, Mrs. Florence R. Elbert, has [fol. 73] against Mrs. S. W. Bowen, both of whom are citizens of the State of Louisiana.

3

That the Court erred in concluding that the previous decisions of this Court (*New Amsterdam Casualty Company vs. Soileau*, 167 Fed (2) 767; *Fisher vs. Home Indemnity Company*, 198 Fed. (2) 218 and *Cushing vs. Maryland Casualty Company*, 198 Fed. (2) 536) had considered and determined the questions raised by the appellee herein and the contention advanced by appellee.

4

That in neither the opinion rendered by the Court in the instant matter nor in any of the previous decisions of this Court does it appear that the Court has heretofore considered or disposed of the questions raised by appellee herein and by the district judge in his disposition of this matter.

5

That the Court erred in failing to decline jurisdiction herein even though it may be determined that the parties involved are citizens of different states, since the matters involved are of a purely local nature and to entertain jurisdiction is prejudical to the public interest (*Sun Oil Company vs. Burford*, 319 *U.S.* 315).

Wherefore, petitioner prays that the opinion and decree herein be recalled and that a rehearing be granted [fol. 74] and that the judgment of the district court be affirmed. Petitioner further prays for all orders necessary for general and equitable relief.

Chas. L. Mayer, Attorney for Defendant-Appellee.

Certificate of Service—(Omitted in Printing)

[fol. 76] OPINION ON PETITION FOR REHEARING AND JUDGE RIVES DISSENTING.

OPINION ON PETITION FOR REHEARING—Filed March 17, 1953.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14353

MRS. FLORENCE R. ELBERT,

Appellant,

versus

LUMBERMAN'S MUTUAL CASUALTY COMPANY,

Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

ON PETITION FOR REHEARING.

(March 17, 1953.)

Before Hutcheson, Chief Judge, and Strum and Rives, Circuit Judges.

PER CURIAM: It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

[fol. 77] RIVES, Circuit Judge: I dissent.

RIVES, Circuit Judge, Dissenting:

On the original hearing, I had strong misgivings which were submitted to my brothers, but I was unable to crystallize my thinking clearly enough to justify a dissent. Continued consideration of the question has convinced me that there is something fundamentally wrong with our legal theories when they permit the great bulk of the

casualty damage suit litigation in Louisiana to clog the dockets of the federal courts, while, I understand, some of the state judges actually do not have enough litigation to keep them busy.

Suits by the injured party directly against the insurer may operate justly under the Civil Law of Louisiana where jury verdicts are not important (see *Wright* vs. *Paramount-Richards Theatres,* 198 F. 2d 303, 306), but where there is a common law right of trial by jury, as in the federal courts, it has been repeatedly recognized that juries are more prone to find liability and to assess heavy damages against a liability insurance company than against the insured. The mere mention of insurance to a jury is reversible error in all but four states of the union, 4 A. L. R. 2d. 761. With both the insured and the insurer present, the federal courts could, in furtherance of justice and to avoid prejudice, order separate trials as to the cause of action against the insured and as to the existence and coverage of the policy. See Rules 20(b) and 42(b), Federal Rules of Civil Procedure. In the absence of the in-[fol. 78] sured as a party defendant, the federal court has no adequate power to protect a defendant insurance company from that known and well recognized prejudice.[3] This Court would be naive not to realize that that factor has much to do with the bringing of most of the automobile damage suits in the federal courts rather than in the state courts of Louisiana.

The transfer of most of the casualty damage suit litigation from the state to the federal courts thus defeats any beneficient public policy of the Louisiana direct action statute intended to operate under the civil law system of Louisiana. It is further in direct conflict with the purpose

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[3] "But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy * * * of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence." N. Y. Central R. R. Co. *vs.* Johnson, 279 U. S. 310, 318.

of diversity jurisdiction designed to avoid "possible discrimination by state courts in favor of resident over non-resident litigants", 54 Am. Jur., United States Courts, Sec. 57; and operates rather to give full play to discrimination against the casualty insurance companies.

It seems to me that federal jurisdiction should be denied or declined upon several grounds. First, it involves the unconstitutional assumption of jurisdiction over controversies between citizens of the same state of Louisiana. Second, if not actually equitable in nature, the rights and procedure are so closely akin thereto that the same principles should be applied by the federal courts as in equity suits, and it should be held (a) that the insured is an indispensable party defendant, and (b) that in the exercise of their sound discretion in matters prejudicial to the public interest and which threaten the rightful independence of state governments in carrying out their domestic policy, the federal courts should decline to exercise jurisdiction against the insurer alone.

[fol. 79] Let use first consider the nature in law of these direct actions against the insurer. Under the law of Louisiana, an action in tort arises solely from Article 2315 of the Louisiana Civil Code reading in part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; * * *".

This action was brought against the appellee insurance company alone under the provisions of Louisiana Revised Statute 22:655, reading in part:

> "* * * The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. * * *."

By its policy issued to the named insured, the appellee company obligated itself "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury • • •." The right of direct action by the injured person against the insurer must be "within the terms and limits of the policy." A cause of action against the insured is the first requisite to a direct action against the liability insurer. *Reeves* vs. *Globe Indemnity Co. of New York*, 182 La. 905, 162 So. 724; *Mock* vs. *Maryland Casualty Company*, 6 So. 2d. 199; *Burke* vs. *Massachusetts Bonding & Insurance Company*, 209 La. 495, 24 So. 2d. 875. The other requisite is, of course, the existence and coverage of the policy, a matter not here in dispute.

[fol. 80] The latest pertinent decision of the Supreme Court of Louisiana, *West* vs. *Monroe Bakery*, 217 La. 189, 46 So. 2d. 122, 123, has said that the object of the statute is to confer:

> "• • • substantive rights on third parties to contracts of public liability insurance, which become vested at the moment of the accident in which they are injured."

See also *Fisher* vs. *Home Indemnity Co.*, 198 F. 2d. 218.

An even later opinion of the Louisiana Court of Appeals for the second circuit has spoken of the direct action statute as being procedural in nature. *Churchman* vs. *Ingram*, 56 So. 2d. 297. The confusion and disagreement as to whether the Act was merely procedural or created a substantive right is fully set forth in an earlier opinion by Judge Dawkins, *Bayard* vs. *Traders & General Ins. Co.*, 99 F. S. 343, 346-353. The case of *New Amsterdam Casualty Company* vs. *Soileau*, 167 F. 2d. 767, indicates that the act is both procedural and substantive. Clearly that part of the Act which gives a right of action direct against the insurer is substantive. Just as clearly, it seems to me, that part which provides that the action

may be brought against either the insurer alone or against both the insured and the insurer jointly is procedural, for the Act itself recognizes that it is just as possible for the injured person to reach the proceeds of a liability policy in an action against both the insured and the insurer as in one against the insurer alone.

The basis for this Court's holding in *New Amsterdam Casualty Co.* vs. *Soileau, supra,* that the action might be maintained in the federal court by the injured person against the insurer alone was that the Act subrogates "the [fol. 81] injured person to all the rights of the insured within the terms and limits of the policy". See also *Cushing* vs. *Maryland Casualty Co.*, 198 F. 2d. 536.

"A subrogee • • • occupies the position of the party for whom he is substituted, and succeeds to the same but no greater rights. He cannot acquire any claim, security, or remedy which the creditor did not have." 50 Am. Jur., Subrogation, Section 110, page 753, and cases cited. Under the terms of the policy, the insured has a right to call upon the company to defend an action against him, but until he has been adjudged responsible to pay the injured party, the insured has no right to call on the insurer to pay the damages. Instead, therefore, of the statute having the effect of a legal subrogation in favor of the injured person to the rights of the insured, the operation of the statute in giving the injured person the right of action against the insurer is more accurately described by the Supreme Court of Louisiana in *Ruiz* vs. *Clancy*, 182 La. 935, 162 So. 734, 736, as accomplished "by compelling the insurer to respond—within the limits of the policy—to the obligation of the insured". The Louisiana Supreme Court has said that the suit by the injured person against the insurer is still *ex delicto*, a suit for damages for personal injuries. *Reeves* vs. *Globe Indemnity Co., supra.* Instead of the injured party being substituted as a party plaintiff in the place of the insured, it is more realistic to say that the insurer is substituted as a party defend-

ant in the place of the insured. The overall effect of the statute, of the accident, and of the suit is to compensate the injured person by damages paid out of an asset provided by the insured.

[fol. 82] By virtue of written provisions in its Code, Louisiana has a limited jurisdiction akin to equity in some cases "where there is no express law" or "where positive law is silent", Louisana Civil Code Art. 21. It does not have the "common law" and "equity" systems established in other states. *Le Blanc* vs. *City of New Orleans*, 70 So. 212, 217; *Hyman* vs. *Hibernia Bank & Trust Co.*, 71 So. 598, 603; *Osborn* vs. *City of Shreveport*, 79 So. 542, 545; *Southern Bell Telephone & Telegraph Co.* vs. *Louisiana Public Service Commission*, 164 So. 786, 790.

The Louisiana direct action statute seems intended to produce the results permitted in common law states by statutes like, for example, the Alabama statute (Alabama Code 1940, Title 28, Sec. 12) where "the judgment creditor may proceed in equity against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment". See also 19 Am. Jur., Equity, Sec. 188; 8 Appleman's Ins. Law & Practice, Secs. 4833 *et seq.*; Blashfield's Cyc. of Auto. Law & Practice, Sec. 4071.

That diversity jurisdiction under the Constitution (Sec. 2 of Art. III) does not exist is elaborately developed in the able opinion of the district judge. *Elbert* vs. *Lumberman's Mutual Casualty Co.*, 107 F. S. 299. I would add only a few thoughts. The situation is clearly distinguishable from cases where the surety may be sued alone for the default of the principal, and is also distinguishable from cases like those of compulsory workmen's compensation insurance for the benefit of injured employees, where the insurance company may be sued alone. In all such cases there is a direct contractual obligation from the surety or insurance company to the injured party plain-

[fol. 83] tiff. Here the insurance was not compulsory; the

insured contracted for it voluntarily for his own protection; under the Louisiana statutes, all of the insured's rights under the policy are preserved insofar as they are consistent with the direct action against the insurer. An action against the insurer involves the establishment really of two causes of action; first, that against the insured and second, the insurer's responsibility therefor. They are not inseparable as in the pendent jurisdiction cases, *Hurn* vs. *Oursler*, 289 U. S. 238. As was said in that case, "The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character." 289 U. S. at 246. It is permissible in Louisiana for both causes of action to be established in a single suit against the insurer, but when the diversity jurisdiction of a federal court is invoked, that court must recognize the two separate and distinct causes of action, and must accept jurisdiction of that one only which is federal in character.

If the district judge and I are mistaken and diversity jurisdiction does exist, it seems to me that the insured is an indispensable party defendant. "Whether parties are indispensable must be determined by the federal court according to federal rather than state rules, for the question of their jurisdiction is one which the federal courts must determine for themselves." *Ford* vs. *Adkins*, 39 F. S. 472, 474. See also *De Korwin* vs. *First National Bank of Chicago*, 156 F. 2d. 858; 3 Moore's Federal Practice (2nd. Ed.) Sec. 19.07, pages 2152, 2153.

[fol. 84] The principles announced by Mr. Justice Curtis in *Shields* vs. *Barrow*, 17 How. 130, 136, as to when parties are indispensable are still sound despite the difficulty in application of those principles. See 3 Moore's Federal Practice, Sec. 19.07, page 2150. Among other tests, a person is an indispensable party if his presence is necessary

to enable the court to do complete and final justice between the parties before the court and, further, if the interest of the absent party is "of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience" *Shields* vs. *Barrow, supra*. This court has said that "the fact that the decree would not be technically binding on the absent parties is not the controlling factor". *Keegan* vs. *Humble Oil & Refining Co.*, 155 F. 2d. 971, 973. In *California* vs. *Southern Pacific Co.*, 157 U. S. 229, 255, the Supreme Court says:

> "Irrespective, then, of the extent, technically speaking, of the effect and operation of a decree as to the seven parcels, based on that ground, as *res adjudicata*, it is impossible to ignore the inquiry whether the interests of persons not before the court would be so affected and the controversy so left open to future litigation as would be inconsistent with equity and good conscience."

While the injured person under the Act has a right of direct action against the insurer, the insured also has certain property rights in the insurance policy, viz.: the insured has the right to be protected from liability to the [fol. 85] extent of the coverage of the policy, whether to the injured person or to some other person who has been or may be injured during the term of the policy.

If the injured party sues the insured first and the insurer has notice of the litigation and an opportunity to control its proceedings, the insurer is bound by the determination of liability of the insured. 8 Appleman's Ins. Law & Practice, Sec. 4860, and cases cited. Whether the reverse holds true, that is, whether the insured would be bound by the determination of liability against his insurer, is a much more difficult question. See 29 Am.

Jur., Insurance, Sec. 1084; Annotations, 137 A. L. R. 1016, 121 A. L. R. 890; 50 C. J. S., Judgments, Sec. 789. If the insured is so bound, then obviously he is an indispensable party defendant for he may lose his counterclaim against the injured person or may be deprived of a part or all of his insurance protection without having his day in court.

Even, however, if the judgment would not be technically binding on the insured as to the issue of liability, that fact is not the controlling factor in determining whether the insured is an indispensable party. *Keegan* vs. *Humble Oil & Refining Co.*, 155 F. 2d. 971, and authorities there cited. The injured party, having failed in a suit against the insurer direct, might still sue the insured. The judgment in the first suit would not conclusively estop the injured party for the issues would be different and it might be that that judgment was based on the failure of proof as to the existence and coverage of the policy, matters not involved in the suit against the insured. The injured party having recovered against the insured, the insured could then call on the insurer to pay the damages [fol. 86] and the fact that the insurer had successfully defended against the injured party would be no answer to the insured. The result follows that if the injured party is permitted to sue the insurer alone in the federal court, the court cannot do final and complete justice and the controversy may be left in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

Finally, if I am mistaken both as to lack of diversity jurisdiction and in my view that the insured is an indispensable party defendant, then it still seems to me that the federal court, as a matter of sound discretion, should decline to exercise jurisdiction against the insurer alone because to do so would be prejudicial to the public interest and would not show "proper regard for the rightful independence of state governments in carrying out their domestic policy". *Pennsylvania* vs. *Williams*, 294 U. S.

176, 185; *Burford* vs. *Sun Oil Co.*, 319 U. S. 315, 318; *Great Lakes Co.* vs. *Huffman*, 319 U. S. 293, 297; *Meredith* vs. *Winter Haven*, 320 U. S. 228, 235; *Alabama Public Service Commission, et al.* vs. *Southern Ry. Co.*, 341 U. S. 341, 349, 350.

I, therefore, respectfully dissent.

[fol. 87] ORDER DENYING REHEARING.

Extract from the Minutes of March 17, 1953.

No. 14353

MRS. FLORENCE R. ELBERT,

versus

LUMBERMAN'S MUTUAL CASUALTY COMPANY.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby denied.

"Rives, Circuit Judge, dissents."

[fol. 88] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 85] SUPREME COURT OF THE UNITED STATES

No. 120, October Term, 1953

LUMBERMEN'S MUTUAL CASUALTY COMPANY, Petitioner,

vs.

FLORENCE R. ELBERT

ORDER ALLOWING CERTIORARI.—Filed May 17, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is assigned for argument on Monday, October 11, immediately following No. 29.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

ATTACHED TO STIPULATION FILED SEPT. 27, 1952

TO OUR POLICYHOLDERS:

Lumbermens and the National Retailers are your companies. By virtue of this policy, you have become a member and an owner of these mutual insurance corporations.

Directors you elect and officers they choose endeavor to administer the affairs of your companies in a manner that will merit your approval. Their efforts can be made more effective with your full cooperation. The greater the success of the companies, the greater will be your benefit from membership, which includes cash dividends paid annually to policyholders.

You can cooperate—

—by working with the companies in their comprehensive safety program to prevent accidents and reduce losses.

—by securing as new policyholders the best type of employers, motorists and property owners, thereby benefiting them as well as strengthening your companies.

—by giving the management constructive criticism and suggestions for the improvement of its departments, branch offices, and service generally.

An Audit Bureau has been established to assist policyholders with respect to all types of insurance. Call upon it for information about your policies or advice concerning any of your insurance problems.

Respectfully,

Chairman

NON-ASSESSABLE AUTOMOBILE POLICIES (SEPARATE INSURANCE BY TWO COMPANIES) ISSUED BY

LUMBERMENS MUTUAL CASUALTY COMPANY

Home Office: Mutual Insurance Building, Chicago 40

AND

NATIONAL RETAILERS MUTUAL INSURANCE COMPANY

Executive Offices: 7450 Sheridan Road, Chicago 26

DECLARATIONS

Trustee
Partnership
Corporation
Individual

1. Name of insured S. W. BOWEN

Address 147 BOULEVARD, SHREVEPORT, CADDO PARISH, LOUISIANA
(INSURED) (CITY OR POST OFFICE) (ROAD) (COUNTY) (STATE)

The automobile will be principally garaged in the above city, county and state, unless otherwise stated herein.

Named insured employed by WOODARD-WALKER-BOWEN, INC. Position MANAGER

Kind of business LBR. BROKERAGE Address of employer SHREVEPORT, LOUISIANA

2. Policy Period: From APRIL 16, 1950 to APRIL 16, 1951 12:01 A. M., Standard Time at the address of the named insured as stated herein.

3. The passenger automobiles will be used for "pleasure and business" and the commercial automobiles will be used for "commercial."

4. Description of the automobile is stated below. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of the policy having reference thereto.

Year of Model	Trade Name	Body Type; Truck Size; Truck Load Cap.	F.O.B. List Price or delivered Price at Factory	Actual Cost When Purchased Including Equip.	Date Purchased Month	Date Purchased Year	New or Used
1949	CHRYSLER	4 DR. SEDAN					
Model	Motor Number	Serial Number					
WINDSOR	C45-13763	70735868	$ "1"	$2739.40	4	49	NEW

COVERAGES	LIMITS OF LIABILITY		National Premium	Lumbermens Premium
A—Bodily Injury Liability	$50,000. Each Person	$100,000 Each Accident	X X X	$ 30.36
B—Property Damage Liability	$5,000.	Each Accident	X X X	$ 13.50
C—Collision or Upset	Actual Cash Value Less $ 100.00	Deductible	$ 43.00	$
D—Medical Payments	$500.00	Each Person	X X X	$ 5.00
E—Comprehensive (EXCLUDING FIRE & THEFT; EXCLUDING COLLISION)	ACV		$ 24.00	X X X
F—Fire, Lightning & Transportation	ACV		$ INCL.	X X X
G—Theft (Broad Form)	ACV		$ INCL.	X X X
H—Windstorm	ACV		$ INCL.	X X X
I—Combined Additional Coverage			$ NIL	X X X
Supplemental Coverage			NIL	
	Total Premium $ 115.86	divided as follows:	$ 67.00	$ 48.86

5. Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the named insured is sole owner of the automobile, except as follows: NO EXCEPTIONS Any loss hereunder is payable as interest may appear to the named insured and ... of ... The encumbrance, if any, is $ ... represented by ... notes of $ ... each. Due date of final installment is ...

6. During the past year no insurer has cancelled any automobile insurance issued to the named insured, except as follows: NO EXCEPTIONS

Countersigned at SHREVEPORT, LOUISIANA

Countersignature date MARCH 20, 1950

KEITH D. PETERSON

Licensed Resident Agent

...ble Policy

...MUTUAL ...MPANY ...ilding, Chicago 40

...AILERS ...RANCE ...Y

...New York

...bermens Mutual ...e home office in ...esday in May of ... and the annual ... Mutual Insurance ... in Glen Cove, ...ceeding the third ... two o'clock P.M. ... in person or by

INSURED S. W. BOWEN
ADDRESS 147 BOULEVARD,
CITY SHREVEPORT STATE LOUISIANA
EFFECTIVE 4-16-50 EXPIRATION 4-16-51

NON-ASSESSABLE

Combination Automobile P...

LUMBERMENS MUT... CASUALTY COMPA... AND NATIONAL RETAIL... MUTUAL INSURAN... COMPANY

Home Office: Glen Cove, New York

The annual meeting of the Lumbermens Casualty Company is held at its home ... Chicago, Illinois, on the third Tuesday in ... each year at eleven o'clock A.M.; and the ... meeting of the National Retailers Mutual ... Company is held at its home office in Gl... New York, on the Tuesday preceding t... Wednesday in April of each year at two o'cl... Each member is entitled to vote in perso... proxy.

ADDRESS 147 BOULEVARD,
CITY SHREVEPORT STATE LOUISIANA
EFFECTIVE 4-16-50 EXPIRATION 4-16-51
MAKE OF CAR CHRYSLER MOTOR NUMBER C45-13763
AGENT KEITH D. PETERSON INSURANCE AGENCY
ADDRESS SHREVEPORT, LOUISIANA

POLICY NO. XXXXXXXXXXXXXXXX U 945 639

RENEWAL OF U 437 776

N.R.M. DIV. ON EXP. POL. $12.62
L.M.-CY DIV. ON EXP. POL. $ 7.33

NO ... NON-ASSESSABLE

Short Rate Cancellation Table For One Year Policies

Days Policy in Force	Per Cent of One Year Premium	Days Policy in Force	Per Cent of One Year Premium
1	5%	154-156	53%
2	6	157-160	54
3-4	7	161-164	55
5-6	8	165-167	56
7-8	9	168-171	57
9-10	10	172-175	58
11-12	11	176-178	59
13-14	12	179-182	60
15-16	13	183-187	61
17-18	14	188-191	62
19-20	15	192-196	63
21-22	16	197-200	64
23-25	17	201-205	65
26-29	18	206-209	66
30-32	19	210-214	67
33-36	20	215-218	68
37-40	21	219-223	69
41-43	22	224-228	70
44-47	23	229-232	71
48-51	24	233-237	72
52-54	25	238-241	73
55-58	26	242-246	74
59-62	27	247-250	75
63-65	28	251-255	76
66-69	29	256-260	77
70-73	30	261-264	78
74-76	31	265-269	79
77-80	32	270-273	80
81-83	33	274-278	81
84-87	34	279-282	82
88-91	35	283-287	83
92-94	36	288-291	84
95-98	37	292-296	85
99-102	38	297-301	86
103-105	39	302-305	87
106-109	40	306-310	88
110-113	41	311-314	89
114-116	42	315-319	90
117-120	43	320-323	91
121-124	44	324-328	92
125-127	45	329-332	93
128-131	46	333-337	94
132-135	47	338-342	95
136-138	48	343-346	96
139-142	49	347-351	97
143-146	50	352-355	98
147-149	51	356-360	99
150-153	52	361-365	100

LUMBERMENS MUTUAL CASUALTY COMPANY
AND
NATIONAL RETAILERS MUTUAL INSURANCE COMPANY

LUMBERMENS MUTUAL CASUALTY COMPANY
AND
NATIONAL RETAILERS MUTUAL INSURANCE COMPANY
(EACH A MUTUAL INSURANCE COMPANY, HEREIN CALLED THE COMPANY)

Severally agree with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy, provided (1) the Lumbermens Mutual Casualty Company shall be the insurer with respect to any one or more of the coverages for which a premium is specified in item 4 of the declarations and no other and (2) the National Retailers Mutual Insurance Company shall be the insurer with respect to any one or more of the coverages for which a premium is specified in item 4 of the declarations and no other:

INSURING AGREEMENTS

I. Coverage A—Bodily Injury Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage B—Property Damage Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage C—Collision or Upset. To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile, but only for the amount of each such loss in excess of the deductible amount, if any, stated in the declarations as applicable hereto.

Coverage D—Medical Payments. To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, ambulance, hospital, professional nursing and funeral services, to or for each person who sustains bodily injury, sickness or disease, caused by accident, while in or upon, entering or alighting from the automobile if the automobile is being used by the named insured or with his permission.

Coverage E—Comprehensive Loss of or Damage to the Automobile, Except by Collision or Upset. To pay for any direct and accidental loss of or damage to the automobile, hereinafter called loss, except loss caused by collision of the automobile with another object or by upset of the automobile or by collision of the automobile with a vehicle to which it is attached. Breakage of glass and loss caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, vandalism, riot or civil commotion shall not be deemed loss caused by collision or upset.

Coverage F—Fire, Lightning and Transportation. To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused (a) by fire or lightning, (b) by smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the automobile is located, or (c) by the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the automobile is being transported on land or on water.

Coverage G—Theft (Broad Form). To pay for loss of or damage to the automobile, hereinafter called loss, caused by theft, larceny, robbery or pilferage.

Coverage H—Windstorm, Earthquake, Explosion, Hail or Water. To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by windstorm, hail, earthquake, explosion, external discharge or leakage of water except loss resulting from rain, snow or sleet.

Coverage I—Combined Additional Coverage. To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by windstorm, hail, earthquake, explosion, riot or civil commotion, or the forced landing or falling of any aircraft or of its parts or equipment, flood or rising waters, external discharge or leakage of water except loss resulting from rain, snow or sleet.

II. Defense, Settlement, Supplementary Payments. As respects the insurance afforded by the other terms of this policy under coverages A and B the company shall:

(a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, the cost of bail bonds required of the insured in the event of accident or traffic law violation during the policy period, not to exceed the usual charges of surety companies nor $100 per bail bond, but without any obligation to apply for or furnish any such bonds;

(c) pay all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;

(d) pay expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident;

(e) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the company in addition to the applicable limit of liability of this policy.

III. Definition of Insured. With respect to the insurance for bodily injury liability and for property damage liability the unqualified word "insured" includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission. The insurance with respect to any person or organization other than the named insured does not apply:

(a) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;

(b) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer.

(b) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer.

IV. Automobile Defined, Trailers, Two or More Automobiles, Including Automatic Insurance.

(a) **Automobile.** Except where stated to the contrary, the word "automobile" means:

(1) **Described Automobile**—the motor vehicle or trailer described in this policy;

(2) **Utility Trailer**—under coverages A, B and D, a trailer not so described, if designed for use with a private passenger automobile, if not being used with another type automobile and if not a home, office, store, display or passenger trailer;

(3) **Temporary Substitute Automobile**—under coverages A, B and D, an automobile not owned by the named insured while temporarily used as the substitute for the described automobile while withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.

(4) **Newly Acquired Automobile**—an automobile, ownership of which is acquired by the named insured who is the owner of the described automobile, if the named insured notifies the company within thirty days following the date of its delivery to him, and if either it replaces an automobile described in this policy or the company insures all automobiles owned by the named insured at such delivery date; but the insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured has other valid and collectible insurance. The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile.

The word "automobile" also includes under coverages C, E, F, G, H and I its equipment and other equipment permanently attached thereto.

INSURING AGREEMENTS (Continued)

(b) **Semitrailer.** The word "trailer" includes semitrailer.

(c) **Two or More Automobiles.** When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability under coverages A and B and separate automobiles as respects limits of liability, including any deductible provisions, under coverages C, E, F, G, H, and I.

V. Use of Other Automobiles. If the named insured is an individual who owns the automobile classified as "pleasure and business" or husband and wife either of whom owns but one automobile, such insurance as is afforded by this policy for bodily injury liability, for property damage liability and for medical payments with respect to such automobile applies with respect to any other automobile, subject to the following provision:

(a) With respect to the insurance for bodily injury liability and for property damage liability the word "insured" includes (1) such named insured, (2) the spouse of such individual if a resident of the same household and (3) any other person or organization legally responsible for the use by such named insured or spouse of an automobile not owned or hired by such other person or organization. Insuring Agreement III, Definition of Insured, does not apply to this insurance.

(b) This insuring agreement does not apply:

(1) to any automobile owned by, hired as part of a frequent use of hired automobiles by, or furnished for regular use to the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;

(2) to any automobile while used in the business or occupation of the named insured or spouse except a private passenger automobile operated or occupied by such named insured, spouse, chauffeur or servant;

(3) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place;

(4) under coverage D, unless the injury results from the operation of such other automobile by such named insured or spouse or on behalf of either by such chauffeur or servant, or from the occupancy of said automobile by such named insured or spouse.

VI. Loss of Use by Theft—Rental Reimbursement. The company, following a theft covered under this policy, shall reimburse the named insured for expenses not exceeding $20 per day and not exceeding more than $150 or the actual cash value of the automobile at time of theft, whichever is less, incurred for the rental of a substitute automobile, including taxicabs.

Reimbursement is limited to such expense incurred during the period commencing seventy-two hours after such theft has been reported to the company and the policy period terminates, regardless of expiration of the policy period, on the date the whereabouts of the automobile becomes known to the named insured or the company or on such earlier date as the company makes or tenders settlement for such theft.

Such reimbursement shall be made only if the stolen automobile was a private passenger automobile not used as a public or livery conveyance and not owned and held for sale by an automobile dealer.

VII. General Average and Salvage Charges. The company, with respect to such transportation insured by coverages A and V under this policy, shall pay any general average and salvage charges for which the named insured becomes legally liable.

VIII. Policy Period, Territory, Purposes of Use. This policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the policy period, while the automobile is within the United States of America, its territories or possessions, Canada or Newfoundland, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations.

EXCLUSIONS

This policy does not apply:

(a) while the automobile is used as a public or livery conveyance, unless such use is specifically declared and described in this policy and premium charged therefor;

(b) under coverages A, B and D, to liability assumed by the insured under any contract or agreement;

(c) under coverages A and B, while the automobile is used for the towing of any trailer owned or hired by the insured and not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company;

(d) under coverages A and D, to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment, other than domestic, of the insured or in domestic employment if benefits therefor are either payable or are required to be provided under any workmen's compensation law;

(e) under coverage A, to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;

(f) under coverage B, to injury to or destruction of property owned by, rented to, in charge of or transported by the insured;

(g) under coverage D, to bodily injury to or sickness, disease or death of any person if benefits therefor are payable under any workmen's compensation law;

(h) under coverages C, E, F, G, H and I, (1) while the automobile is subject to any bailment lease, conditional sale, mortgage or other encumbrance not specifically declared and described in this policy; (2) to loss due to war, whether or not declared, invasion, civil war, insurrection, rebellion or revolution or to confiscation by duly constituted governmental or civil authority; (3) to any damage to the automobile which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage is the result of other loss covered by this policy; (4) to robes, wearing apparel or personal effects; or (5) to tires unless damaged by fire or stolen or unless such loss be coincident with other loss covered by this policy;

(i) under coverages E and G, to loss due to conversion, embezzlement or secretion by any person in lawful possession of the automobile under a bailment lease, conditional sale, mortgage or other encumbrance;

(j) under coverage C, to breakage of glass if insurance with respect to such breakage is otherwise afforded.

CONDITIONS

1. Use. (a) The term "pleasure and business" is defined as personal, pleasure, family and business use (b) The term "commercial" is defined as use principally in the business occupation of the named insured as stated in Declaration I, including occasional use for personal, pleasure, family and other business purposes. (c) Use of the automobile for the purposes stated includes the loading and unloading thereof.

2. Notice of Accident. Coverages A, B and D. When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

3. Notice of Claim or Suit. Coverages A and B. If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

4. Limits of Liability. Coverage A. The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to "each accident," subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one accident.

5. Limit of Liability. Coverage D. The limit of liability for medical payments stated in the declarations as applicable to "each person" is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury, sickness or disease, including death resulting therefrom, in any one accident.

6. Limits of Liability. Coverages A, B, and D. The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

7. Action Against Company. Coverages A and B. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

8. Action Against Company. Coverage D. No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy, nor until thirty days after the required proofs of claim have been filed with the company.

9. Financial Responsibility Laws. Coverages A and B. Such insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

10. Assault and Battery. Coverages A and B. Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

11. Medical Reports; Proof and Payment of Claim. Coverage D. As soon as practicable the injured person or someone on his behalf shall give to the company written proof of claim, under oath if required, and shall, after each request from the company, execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

The company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment of benefits shall not constitute admission of liability of the insured or, except hereunder, of the company.

12. Named Insured's Duties When Loss Occurs. Coverages C, E, F, G, H and I. The named insured shall

(a) protect the automobile, whether or not the loss is covered by this policy, and any further loss due to the named insured's failure to protect shall not be recoverable under this policy; reasonable expenses incurred in affording such protection shall be deemed incurred at the company's request;

(b) give notice thereof as soon as practicable to the company or any of its authorized agents and also, in the event of theft, larceny, robbery or pilferage, to the police but shall not, except at his own cost, offer to pay any reward for recovery of the automobile;

(c) file proof of loss with the company within sixty days after the occurrence of loss, unless such time is extended in writing by the company, in the form of a sworn statement of the named insured setting forth the interest of the named insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, the amount of rental or other expense for which reimbursement is provided under this policy, together with original receipts therefor, and the description and amounts of all other insurance covering such property.

Upon the company's request, the named insured shall exhibit the damaged property to the company and submit to examinations under oath by anyone designated by the company, subscribe the same and produce for the company's examination all pertinent records and sales invoices, or certified copies if originals be lost, permitting copies thereof to be made, all at such reasonable times and places as the company shall designate.

13. Appraisal. Coverages C, E, F, G, H and I. If the named insured and the company fail to agree as to the amount of loss, each shall on the written demand of either, made within sixty days after receipt of proof of loss by the company, select a competent and disinterested appraiser, and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen days to agree upon such umpire, then, on the request of the named insured or the company, such umpire shall be selected by a judge of a court of record in the county and state in which such appraisal is pending. The appraisers shall then appraise the loss, stating separately the actual cash value at the time of loss and the amount of loss, and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The named insured and the company shall each pay his or its chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The company shall not be held to have waived any of its rights by any act relating to appraisal.

14. Limits of Liability; Settlement Options; No Abandonment. Coverages C, E, F, G, H and I. The limit of the company's liability for loss shall not exceed the actual cash value of the automobile, or if the loss is of a part thereof the actual cash value of such part, at time of loss nor what it would then cost to repair or replace the automobile or such part thereof with other of like kind and quality, with deduction for depreciation, nor the applicable limit of liability stated in the declarations.

The company may pay for the loss in money or may repair or replace the automobile or such part thereof, as aforesaid, or may return any stolen property with payment for any resultant damage thereto at any time before the loss is paid or the property is so replaced, or may take all or such part of the automobile at the agreed or appraised value but there shall be no abandonment to the company.

15. Payment for Loss; Action Against Company. Coverages C, E, F, G, H and I. No action shall lie against the company unless, as a condition precedent thereto, the named insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy.

16. No Benefit to Bailee. Coverages C, E, F, G, H and I. The insurance afforded by this policy shall not enure directly or indirectly to the benefit of any carrier or bailee liable for loss to the automobile.

17. Assistance and Cooperation of the Insured. Coverages A, B, C, E, F, G, H and I. The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

18. Subrogation. Coverages A, B, C, E, F, G, H and I. In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery thereof against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

19. Other Insurance. Coverages A, B, C, E, F, G, H and I. If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to temporary substitute automobiles under Insuring Agreement V or other automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to said automobiles or otherwise.

20. Other Insurance. Coverage D. The insurance afforded with respect to other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible medical payments insurance applicable thereto.

21. Changes. Notice to any agent, or knowledge possessed by any agent or by any other person shall not effect a waiver or change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by a duly authorized officer or representative of the company.

22. Assignment. Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within sixty days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured and (2) with respect to coverages A and B, subject otherwise to the provisions of Insuring Agreement III, any person having proper temporary custody of the automobile, as an insured, and under coverage D while the automobile is used by such person, until the appointment and qualification of such legal representative but no event for a period of more than sixty days after the date of such death or adjudication.

23. Cancelation. This policy may be canceled by the named insured by surrender thereof or by mailing to the company written notice stating when thereafter such cancelation shall be effective. This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and if not then made, shall be made as soon as practicable after cancelation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.

24. Special North Carolina Conditions—Proofs of Loss. As respects the State of North Carolina, the failure of the insured to furnish proofs of loss as required by the terms of this policy shall not debar him from recovery hereunder unless within fifteen days after receipt of notice of loss the company or its representative shall provide the insured with a blank or blanks in duplicate, to be used for the purpose of making such proofs of loss.

25. Special Missouri Conditions—Proof of Loss. As respects the State of Missouri, the sixty day provision for filing proof of loss with the company is extended to ninety days.

26. Terms of Policy Conformed to Statute. Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes.

27. Declarations. By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company and any of its agents relating to this insurance.

28. Mutual Policy Conditions. This is a perpetual mutual corporation owned by and operated for the benefit of its members. This is a non-assessable, participating policy under which the Board of Directors in its discretion may determine and pay unabsorbed premium deposit refunds (dividends) to the insured.

IN WITNESS WHEREOF, the LUMBERMENS MUTUAL CASUALTY COMPANY has caused this policy to be signed by its President and Secretary at Chicago, Illinois, but this policy shall not be valid unless countersigned on the declarations page by a duly authorized representative of the company.

H. L. Kennedy Secretary — Wm. Lemmon President

IN WITNESS WHEREOF, the NATIONAL RETAILERS MUTUAL INSURANCE COMPANY has caused this policy to be signed by its President and Secretary at Glen Cove, New York, but this policy shall not be valid unless countersigned on the declarations page by a duly authorized representative of the company.

Chazell Smith Secretary — President

4833 et seq.; 6 Blashfield's Cyc. of Auto. Law & Practice, Sec. 4071.

That diversity jurisdiction under the Constitution, Sec. 2 of Art. III, does not exist is elaborately developed in the able opinion of the district judge. Elbert v. Lumberman's Mutual Casualty Co., D.C. 107 F. Supp. 299. I would add only a few thoughts. The situation is clearly distinguishable from cases where the surety may be sued alone for the default of the principal, and is also distinguishable from cases like those of compulsory workmen's compensation insurance for the benefit of injured employees, where the insurance company may be sued alone. In all such cases there is a direct contractural obligation from the surety or insurance company to the injured party plaintiff. Here the insurance was not compulsory; the insured contracted for it voluntarily for his own protection; under the Louisiana statutes, all of the insured's rights under the policy are preserved insofar as they are consistent with the direct action against the insurer. An action against the insurer involves the establishment really of two causes of action; first, that against the insured and second, the insurer's responsibility therefor. They are not inseparable as in the pendent jurisdiction cases, Hurn v. Oursler, 289 U.S. 238, 53 S. Ct. 586, 77 L. Ed. 1148. As was said in that case, "The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one

in a cause entitled

Mrs. Florence R. Elbert

versus

Lumbermens Mutual Casualty Company

No. 3548 on the Civil docket of said Court, as the original of same appears on file in this office.

WITNESS my hand and seal of office at the City of Shreveport, Louisiana, on this the 10th day of August, A.D. 1954

ALTON L. CURTIS
Clerk, U. S. District Court
Western District of Louisiana

By _____
Deputy Clerk

He concluded that federal jurisdiction should be denied or declined because, "First, it involves the unconstitutional assumption of jurisdiction over controversies between citizens of the same state of Louisiana. Second, if not actually equitable in nature, the rights and procedure are so closely akin thereto that the same principles should be applied by the federal courts as in equity suits, and it should be held (a) that the insured is an indispensable party defendant, and (b) that in the exercise of their sound discretion in matters prejudicial to the public interest and which threaten the rightful independence of state governments in carrying out their domestic policy, the federal courts should decline to exercise jurisdiction against the insurer alone."

REASONS FOR GRANTING THE WRIT

This is an action brought by a citizen of Louisiana against a non-resident insurance company seeking to recover damages suffered as a result of alleged acts of negligence committed in the State of Louisiana by a citizen of Louisiana to whom the non-resident insurance company had issued a contract of public liability insurance. As pointed out by the opinion of the district court this is merely one of a large number of similar suits filed in the federal district courts of Louisiana which has doubled the work of that court, all of said suits being by citizens of Louisiana alleging that the controversy is between citizens of different states. Judge Rives in his dissenting opinion recognized "that there is something fundamentally wrong

parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state. As amended, Acts 1950, No. 541, paragraph 1."

CERTIFICATE OF CLERK OF COURT

District Court of the United States

Western District of Louisiana

CLERK'S OFFICE

I, ALTON L. CURTIS, Clerk of the United States District Court for the Western District of Louisiana, do hereby certify that the foregoing TWO (2) pages contain a full, true, and correct copy of

Insurance Policy No. U 945 639 which was attached to Stipulation filed September 27, 1952

with our legal theories when they permit the great bulk of the casualty damage suit litigation of Louisiana to clog the dockets of the federal courts." Congress granted jurisdiction to the federal courts in diversity of citizenship cases to guard against possible discrimination by the state courts in favor of resident over non-resident litigants. We submit that the action of the court below in reversing the decision of the district court and directing that court to accept jurisdiction in cases of this nature is contrary to the purpose for which diversity jurisdiction was created and conflicts in principle with the decisions of this court and calls for review by this court.

1.

The acceptance by the federal courts of jurisdictions in cases of this nature is contrary to the purpose for which diversity jurisdiction was created and conflicts in principle with the decisions of this court. The principle reason for vesting diversity jurisdiction in the federal courts (if not the sole reason) was to afford a non-resident citizen a fair, unprejudiced and unbiased forum whenever he should become a party to a suit in a state other than his own. *The Historic Basis of Diversity Jurisdiction, 41 Harvard Law Rev. 483.* As pointed out in the above cited treatise, the Supreme Court from its earliest application of the provisions creating diversity jurisdiction has been fully cognizant that "there was no reason for taking over business which the state courts could handle without serious prejudice to any national interest."

OPINION OF THE UNITED STATES COURT OF APPEALS ON REHEARING

MRS. FLORENCE R. ELBERT,
Appellant

vs.

LUMBERMENS MUTUAL CASUALTY COMPANY
Appellee

No. 14,353

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Rehearing Denied March 17, 1953.

Before HUTCHESON, Chief Judge, and STRUM and RIVES, Circuit Judges.

PER CURIAM.

It is ordered that the petition for rehearing in the above entitled and numbered cause be, and it is hereby denied.

RIVES, Circuit Judge (dissenting).

On the original hearing, I had strong misgivings which were submitted to my brothers, but I was unable to crystallize my thinking clearly enough to justify a dissent. Continued consideration of the question has convinced me that there is something fundamentally wrong with our legal theories when they permit the great bulk of the casualty damage suit litigation in Louisiana to clog

rehearing is reported at 108 Fed. Supp. 157. The opinion of the Court of Appeals for the Fifth Circuit is reported at 201 Fed (2) 500. Its opinion on rehearing is reported at 202 Fed (2) 744 (also pg 17-28 herein).

JURISDICTION

The original opinion of the Court of Appeals was rendered January 29, 1953, and judgment entered. The appellee (petitioner herein) timely filed an application for rehearing on February 13, 1953. The application for rehearing was denied March 17, 1953. The jurisdiction of this Court is invoked under the provisions of 28 USC 1254(1).

QUESTIONS PRESENTED

The basic questions presented are:

1.

Is the real matter in controversy actually between citizens of different states such as vests jurisdiction in the federal court on the grounds of diversity, where a citizen of Louisiana proceeding under a statute of the State of Louisiana institutes a direct action against a foreign public liability insurer of another citizen of Louisiana to recover damages as the result of an act of negligence committed in Louisiana by the Louisiana assured? This question in turn involves the following subsidiary questions:

In the case of *City of Indianapolis et al vs Chase National Bank 314 U.S. 63, 86 Law Ed. 47* this Court announced the principles to be applied in determining whether a case falls within the objects and purposes of the diversity jurisdiction provisions and pointed out that to sustain such jurisdiction there must exist an actual, substantial controversy between citizens of different states and that it was the duty of the courts to look beyond the pleadings; that litigation is a pursuit of practical ends and that, therefore, jurisdiction was not to be determined by mechanical rules. It was further pointed out that the court should ascertain the principal purpose of the suit and the primary and controlling matter in dispute. Numerous decisions of this Court were cited as the source establishing these various prerequisites. The principles announced by this Court in the case of *City of Indianapolis et al vs Chase National Bank* (supra) and the prior decisions of this Court cited therein were discussed and applied by the district court in arriving at its decision, but were completely ignored without even so much as a comment by the court below.

There can be no doubt in the minds of anyone but that a local citizen, who institutes a direct action against a non-resident public liability insurance company and tries such action before a jury of laymen under a system whereby the findings of the jury on questions of fact cannot be disturbed, is allowed to enjoy a definite prejudicial advantage over his adversary. Judge Rives observed in his dissent in the instant matter:

the dockets of the federal courts, while, I understand, some of the state judges actually do not have enough litigation to keep them busy.

Suits by the injured party directly against the insurer may operate justly under the Civil Law of Louisiana where jury verdicts are not important, see Wright v. Paramount-Richards Theatres, 5 Cir., 198 F. 2d 303, 306, but where there is a common law right of trial by jury, as in the federal courts, it has been repeatedly recognized that juries are more prone to find liability and to assess heavy damages against a liability insurance company than against the insured. The mere mention of insurance to a jury is reversible error in all but four states of the union, Wheeler v. Kudek, 397 Ill. 438, 74 N.E. 2d 601, 4 A.L.R. 2d 761. With both the insured and the insurer present, the federal courts could, in futherance of justice and to avoid prejudice, order separate trials as to the cause of action against the insured and as to the existence and coverage of the policy. See Rules 20(b) and 42(b), Federal Rules of Civil Procedure, 28 U.S.C.A. In the absence of the insured as a party defendant, the federal court has no adequate power to protect a defendant insurance company from that known and well recognized prejudice.[1] This Court would be naive not to realize that

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1. "But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy** of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence." N. Y. Central R. R. Co. v. Johnson, 279 U. S. 310, 318, 49 S. Ct. 300, 303, 73 L. Ed. 706.

only of which is federal in character." 289 U.S. at page 246, 53 S. Ct. at page 589. It is permissible in Louisiana for both causes of action to be established in a single suit against the insurer, but when the diversity jurisdiction of a federal court is invoked, that court must recognize the two separate and distinct causes of action, and must accept jurisdiction of that one only which is federal in character.

If the district judge and I are mistaken and diversity jurisdiction does exist, it seems to me that the insured is an indispensable party defendant. "Whether parties are indispensable must be determined by the federal court according to federal rather than state rules, for the question of their jurisdiction is one which the federal courts must determine for themselves." Ford v. Adkins, D.C. 39 Supp. 472, 474. See also De Korwin v. First National Bank of Chicago, 7 Cir., 156 F. 2d 858; 3 Moore's Federal Practice, 2d Ed., Sec. 19.07, pages 2152, 2153.

The principles announced by Mr. Justice Curtis in Shields v. Barrow, 17 How. 129, 130, 136, 15 L. Ed. 158, as to when parties are indispensable are still sound despite the difficulty in application of those principles. See 3 Moore's Federal Practice, Sec. 19.07, page 2150. Among other tests, a person is an indispensable party if his presence is necessary to enable the court to do complete and final justice between the parties before the court and, further, if the interest of the absent party is "of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such

> "This court would be naive not to recognize that that factor has much to do with the bringing of most of the automobile damage suits in the federal courts rather than in the state courts of Louisiana."

Congress granted jurisdiction to the federal courts in diversity of citizenship cases to guard against possible discrimination by state courts in favor of resident over non-resident litigants but it appears that that which was designed as a shield to protect the non-resident litigants has, by the decision rendered by the court below, been converted into a club to be used by the resident against them.

2.

In this type of proceeding the federal court cannot do final and complete justice and the proceedings therein lead to a result substantially different from that which would be attained in the state court. Should the defendant insurer be successful in avoiding liability in a direct action suit instituted in the federal court by the injured person, that would not prevent the injured person from then going into the state court and instituting another suit against the insured. As pointed out by Judge Rives:

> "The Judgment in the first suit would not conclusively estop the injured party for the issues would be different and it might be that judgment was based on the failure of proof as to the existence and coverage of the the policy, matters not involved in the suit against the insured."

(a) Is the insured in such action an indispensable party?

(b) Should the federal court accept jurisdiction on the grounds of diversity of citizenship of parties where the court cannot do final and complete justice and the controversy may be left in such a condition that its final termination may be wholly inconsistent with equity and good conscience?

2.

Should such effect be given by the federal courts to an act of the legislature of Louisiana as would result in citizens of Louisiana being afforded an unfair and prejudicial advantage over non-resident litigants by invoking the jurisdiction of the federal court on the grounds of diversity of citizenship? This question in turn involves the following subsidiary questions:

(a) Are those provisions of the Louisiana R. S. 22:655 granting an injured party the right to sue a public liability insurer alone purely procedural and, if so, are they applicable in a federal court action?

(b) Should the federal court entertain jurisdiction on the grounds of diversity where such diversity as exists arises only by virtue of a state statute and where the proceedings in the federal court lead to a result substantially different from that which would be attained in the state court?

that factor has much to do with the bringing of most of the automobile damage suits in the federal courts rather than in the state courts of Louisiana.

The transfer of most of the casualty damage suit litigation from the state to the federal courts thus defeats any beneficient public policy of the Louisiana direct action statute intended to operate under the civil law system of Louisiana. It is further in direct conflict with the purpose of diversity jurisdiction designed to avoid "possible discrimination by state courts in favor of resident over non-resident litigants", 54 Am. Jur., United States Courts Sec. 57; and operates rather to give full play to discrimination against the casualty insurance companies.

It seem to me that federal jurisdiction should be denied or declined upon several grounds. First, it involves the unconstitutional assumption of jurisdiction over controversies between citizens of the same state of Louisiana. Second, if not actually equitable in nature, the rights and procedure are so closely akin thereto that the same principles should be applied by the federal courts as in equity suits, and it should be held (a) that the insured is an indispensable party defendant, and (b) that in the exercise of their sound discretion in matters prejudicial to the public interest and which threaten the rightful independence of state governments in carrying out their domestic policy, the federal courts should decline to exercise jurisdiction against the insurer alone.

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1952~~ 1954

No. ~~862~~ [redacted] //

LUMBERMENS MUTUAL CASUALTY COMPANY
Petitioner

vs.

FLORENCE R. ELBERT
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LECOMTE, SHREVEPORT, LOUISIANA

Where a jury merely returns a verdict "for the defendant" there is, of course, no means of determining the basis for that decision. If the injured party is thus permitted to sue the insurer alone in the federal court that court cannot do final justice and the controversy may be left in a completely unfinished condition.

Mr. Justice Douglas pointed out in the decision rendered by this Court in *Reagan vs Merchants Transfer* & Warehouse Company, 337 U.S. 530, 93 Law Ed. 1520 that in diversity cases the rights enjoyed under local laws should not vary because enforcement of those rights was sought in the federal court rather than in the state court and in the case of *Guaranty Trust Company vs York, 326* U.S. 96, 89 Law Ed. 2079 Mr. Justice Frankfurter, as the organ of the Court, declared that in such cases the outcome of the litigation in the federal court should be substantially the same as it would be if tried in a state court. Because of the peculiarity of the judicial system in the state of Louisiana, the application of the Louisiana direct action statute (L.R.S. 22:655) in a proceeding in the federal court leads to a result substantially different from that which would be attained in the state court. The practice in the courts of Louisiana is well outlined in the dissenting opinion of Mr. Justice McLean in the case of *Parsons vs Bedford, 3 Pet. 433, 7 Law Ed. 732.* The Louisiana Code of Practice provides for jury trials in certain civil cases but appellate courts have the right and the duty to review both the law and the facts in all civil cases. *Wright vs Paramount-Richards Theatres, 198 Fed (2) 303;*

(c) Should the federal court exercise diversity jurisdiction where to do so would be prejudicial to the public interest and would not show proper regard for the rightful independence of state government in carrying out their domestic policy?

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the appendix, infra, pages 15-16.

STATEMENT

On February 21, 1951, Mrs. Florence R. Elbert, a resident and citizen of Shreveport, Louisiana, was injured after she had alighted from an automobile which had been brought to a stop in front of her home in Shreveport, Louisiana. The automobile was owned by Mr. S. W. Bowen, a resident and citizen of Shreveport, Louisiana, and at the time was being operated by his wife, Mrs. S. W. Bowen, a resident and citizen of Louisiana.

The Lumbermens Mutual Casualty Company had issued to Mr. S. W. Bowen a contract of public liability insurance covering the vehicle owned by him and driven by his wife under which said company obligated itself to pay on behalf of the insured those sums which the insured should become legally obligated to pay as damages because of bodily injuries arising out of the ownership, maintenance and use of the insured vehicle.

Under date of December 4, 1951, Mrs. Florence R. Elbert instituted the present action directly against

Let us first consider the nature in law of these direct actions against the insurer. Under the law of Louisiana, an action in tort arises solely from Article 2315 of the LSA-Civil Code reading in part: "Every act whatever a man that causes damage to another, obliges him by whose fault it happened to repair it;***."

This action was brought against the appellee insurance company alone under the provisions of LSA-R.S. 22:655, reading in part:

> "***The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido.***"

By its policy issued to the named insured, the appellee company obligated itself "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury***." The right of direct action by the injured person against the insurer must be "within the terms and limits of the policy." A cause of action against the insured is the first requisite to a direct action against the liability insurer. Reeves v. Globe Indemnity Co. of New York, 182 La. 905, 162 So. 724, 735; Mock v. Maryland Casualty Company, La. App., 6 So. 2d 199; Burke v. Massachusetts Bonding & Insurance Company, 209 La. 495, 24 So. 2d 875. The

a condition that its final termination may be wholly inconsistent with equity and good conscience" Shields v. Barrow, supra. This court has said that "the fact that the decree would not be technically binding on the absent parties is not the controlling factor." Keegan v. Humble Oil & Refining Co., 5 Cir., 155 F. 2d 971, 973. In State of California v. Southern Pacific Co., 157 U.S. 229, 255, 15 S. Ct. 591, 601, 39 L. Ed. 683, the Supreme Court says:

> "Irrespective, then, of the extent technically speaking, of the effect and operation of a decree as to the seven parcels, based on that ground, as *res adjudicata*, it is impossible to ignore the injuiry whether the interests of persons not before the court would be so affected, and the controversy so left open to future litigation. as would be inconsistent with equity and good conscience."

While the injured person under the Act has a right of direct action against the insurer, the insured also has certain property rights in the insurance policy, viz.: the insured has the right to be protected from liability to the extent of the coverage of the policy, whether to the injured person or to some other person who has been or may be injured during the term of the policy.

If the injured party sues the insured first and the insurer has notice of the litigation and an opportunity to control its proceedings, the insurer is bound by the determination of liability of the insured. 8 Appleman's Ins. Law & Practice, Sec. 4860, and cases cited. Whether the reverse holds true, that is, whether the insured would

Louisiana Constitution of 1921, Article 7, Section 10. Thus it appears that in the application of these statutory provisions of the legislature of Louisiana the appellate courts of that state are not only entitled to, but under a duty to, review the evidence and to determine for themselves the facts upon which their ultimate decision must rest and, if their conclusions do not coincide with that of the trial jury, they make their own findings of fact and render judgment accordingly. These appellate judges being trained, experienced jurists, the dangers that arise out of the direct action proceedings from the prejudice and bias against the insurance companies which exists in the minds of the ordinary lay juror is thereby corrected. The federal courts, on the other hand, are forbidden to re-examine any fact tried by a jury otherwise than according to the rules of the common law, while the Louisiana state courts can review the facts in all civil cases. *Wright vs Paramount-Richards Theatres* (supra).

3.

The question involved is important. The determination of the question presented will affect hundreds of thousands of persons in the State of Louisiana as well as the entire insurance industry doing business in that state. The rates which must be charged by an insurance company for its contracts of insurance is, of course, determined by their loss experience in the particular area in which the contracts are written. If the federal courts with its jury system is to entertain jurisdiction in these cases and the

Lumbermens Mutual Casualty Company alone. The Jurisdiction of the federal court was urged upon the basis that the matter in controversy was between citizens of different states title 28 USC Sec. 1332(a). The institution of the action by the plaintiff against the public liability insurer alone was brought under the provisions of Louisiana Revised Statutes 22:655.

The Lumbermens Mutual Casualty Company moved to dismiss the action urging that the provisions of the Louisiana Revised Statutes 22:655 were procedural and, therefore, not applicable in the federal court and further that proper diversity of citizenship between the parties did not actually exist since the real matter in controversy was the determination of whether or not Mrs. S. W. Bowen, a citizen of Shreveport, Louisiana, had committed an act of negligence in Shreveport, Louisiana which had resulted in an injury to the plaintiff who was also a citizen of Louisiana.

The district court upheld the defendant's motion to dismiss with an opinion holding that to sustain diversity jurisdiction there must exist an actual, substantial controversy between citizens of different states; that in considering between whom the actual controversy existed the court must determine the principal purpose of the suit and the primary and controlling matter in dispute. Applying those principles the court concluded that it was obvious that the primary, controlling matter in dispute was the determination of the rights of the plaintiff, a

be bound by the determination of liability against his insurer, is a much more difficult question. See 29 Am. Jur., Insurance, Sec. 1084; Annotations, 137 A.L.R. 1016, 121 A.L.R. 890; 50 C.J.S., Jugdments, paragraph 789. If the insured is so bound, then obviously he is an indispensable party defendant for he may lose his counterclaim against the injured person or may be deprived of a part or all of his insurance protection without having his day in court.

Even, however, if the judgment would not be technically binding on the insured as to the issue of liability, that fact is not the controlling factor in determining whether the insured is an indispensable party. Keegan v. Humble Oil & Refining Co., 5 Cir., 155 F. 2d 971, and authorities there cited. The injured party, having failed in a suit against the insurer direct, might still sue the insured. The judgment in the first suit would not conclusively estop the injured party for the issues would be different and it might be that that judgment was based on the failure of proof as to the existence and coverage of the policy, matters not involved in the suit against the insured. The injured party having recovered against the insured, the insured could then call on the insurer to pay the damages and the fact that the insurer has successfully defended against the injured party would be no answer to the insured. The result follows that if the injured party is permitted to sue the insurer alone in the federal court, the court cannot do final and complete justice and the controversy may be left in such a condition that its

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other requisite is, of course, the existence and coverage of the policy, a matter not here in dispute.

The latest pertinent decision of the Supreme Court of Louisiana, West v. Monroe Bakery, 217 La. 189, 46 So. 2d 122, 123, has said that the object of the statute is to confer:

> "***substantive rights on third parties to contracts of liability insurance, which become vested at the moment of the accident in which they are injured."

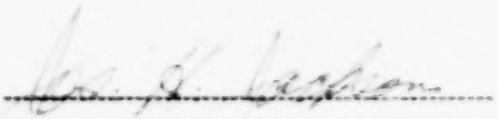
See also Fisher v. Homer Indemnity Co., 5 Cir., 198 F. 2d 218.

An even later opinion of the Louisiana Court of Appeals for the second circuit has spoken of the direct action statute as being procedural in nature. Churchman v. Ingram, La. App., 56 So. 2d 297. The confusion and disagreement as to whether the Act was merely procedural or created a substantive right is fully set forth in an earlier opinion by Judge Dawkins, Bayard v. Traders & General Ins. Co., D.C., 99 F. Supp. 343, 346-353. The case of New Amsterdam Casualty Company v. Soileau, 167 F. 2d 767, 770, 6 A.L.R. 2d 128, indicates that the act is both procedural and substantive. Clearly that part of the Act which gives a right of action direct against the insurer is substantive. Just as clearly, it seems to me, that part which provides that the action may be brought against either the insurer alone or against both the insured and the insurer jointly is procedural, for the Act itself recognizes that it is just as possible for the injured

local citizens of Louisiana are to be allowed to institute these actions directly against the foreign insurance company alone, the biased and prejudicial advantage which these plaintiffs will enjoy will substantially increase the loss experience of the insurance companies in the State of Louisiana. (The impact of these proceedings in this state has already been noted with great alarm by the insurance industry.) The net result will be, either that the companies will have to discontinue doing business in this state, or else the insurance purchasing public of the state will have to bear a considerable burden as the result of substantially increased insurance premiums.

CONCLUSION

For reasons stated, it is respectfully submitted that the petition herein for a writ of certiorari should be granted.



Joseph H. Jackson

OF COUNSEL
Charles L. Mayer

May 1953

person to reach the proceeds of a liability policy in an action against both the insured and the insurer as in one against the insurer alone.

The basis for this Court's holding in New Amsterdam Casualty Co. v. Soileau, supra, that the action might be maintained in the federal court by the injured person against the insurer alone was that the Act subrogates "the injured person to all the rights of the insured within the terms and limits of the policy." See also Cushing v. Maryland Casualty Co., 5 Cir., 198 F. 2d 536.

"A subrogee***occupies the position of the party for whom he is substituted, and succeeds to the same but no greater rights. He cannot acquire any claim, security, or remedy which the creditor did not have." 50 Am. Jur., Subrogation, Section 110, page 753, and cases cited. Under the terms of the policy, the insured has a right to call upon the company to defend an action against him but until he has been adjudged responsible to pay the injured party, the insured has no right to call on the insurer to pay the damages. Instead, therefore, the statute having the effect of a legal subrogation in favor of the injured person to the rights of the insured, the operation of the statute in giving the injured person a right of action against the insurer is more accurately described by the Supreme Court of Louisiana in Ruiz v. Clancy, 182 La. 935, 162 So. 734, 736, as accomplished "by compelling the insurer to respond—within the limits of the policy—to the obligation of the insured." The Louisiana Supreme Court has said that the suit by the injured person against

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citizen of Louisiana, against the alleged tort-feasor, a citizen of Louisiana, under the cause of action created by Article 2315 of the Revised Civil Code of Louisiana (R 15, 107 Fed. Sup. 299).

The plaintiff filed a motion for rehearing which was overruled by the district court with an opinion further emphasizing that the only cause of action existing in favor of a plaintiff under the laws of Louisiana as the result of an alleged tort arises under Article 2315 of the Louisiana Revised Civil Code and that the actual and real controversy involved was the determination of the issue of negligence as between the plaintiff and the driver of the automobile, both citizens of Louisiana (R 40, 108 Fed. Sup. 157).

The plaintiff appealed from the judgment of the district court sustaining defendant's motion to dismiss. The court below reversed the decision of the district court and ordered the case remanded without making any comment upon, or disposing of, the contentions and principles advanced by the district judge in his two written opinions and by the appellee in support of the decision of the district court. The court below merely declared that "upon principle and authority" the judgment of the district court was wrong and should, therefore, be reversed. Just what "principles" were relied upon were not stated and the only "authority" indicated by the court were three decisions previously rendered by that court (one of which is now before this Court, certiorari having been granted March 9, 1953, The Jane Smith, Maryland Casualty Company et al vs. Gertrude Picard Cushing et al, No. 498), all of

final termination may be wholly inconsistent with equity and good conscience.

Finally, if I am mistaken both as to lack of diversity jurisdiction and in my view that the insured is an indispensable party defendant, then it still seems to be that the federal court, as a matter of sound discretion, should decline to exercise jurisdiction against the insurer alone because to do so would be prejudicial to the public interest and would not show "proper regard for the rightful independence of state governments in carrying out their domestic policy." Commonwealth of Pennsylvania v. Williams, 294 U.S. 176, 185, 55 S. Ct. 380, 385, 79 L. Ed. 841; Burford v. Sun Oil Co., 319 U.S. 315, 318, 63 S. Ct. 1098, 87 L. Ed. 1424; Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293, 297, 63 S. Ct. 1070, 87 L. Ed. 1407; Meredith v. City of Winter Haven, 320 U. S. 228, 235, 64 S. Ct. 7, 88 L. Ed. 9; Alabama Public Service Commission v. Southern Ry. Co., 341 U.S. 341, 349, 350, 71 S. Ct. 762, 95 L. Ed. 1002.

I, therefore, respectfully dissent.

APPENDIX

STATUTES INVOLVED

1. Title 28 USC Section 1332(a)

   "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000.00 exclusive of interest and costs, and is between:

   "(1) Citizens of different states."

2. The Revised Civil Code of the State of Louisiana, Article 2315

   "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it.****"

3. Louisiana Revised Statutes (1950) 22:655

   "No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the

which had been considered and discussed at length in the opinion of the district court and none of which had discussed or considered the issues upon which the district court had based its conclusions (R 68, 201 Fed. Rpr. (2) 500).

The appellee in the court below timely filed an application for rehearing which was refused by a majority of the court without any further written reasons. Judge Rives, however, dissented with written reasons (R 75, 202 Fed. Rpr. (2) 744-appendix, infra, pages 17-30) Judge Rives took note of the fact that suits by an injured party directly against an insurer may operate justly under the civil law of Louisiana where the appellate court has the right and the duty to review both the law and the facts in all civil cases and render judgment on their own findings without regard to the holding of a trial jury, but that in the federal courts such procedure cannot be followed, that it has been repeatedly recognized that juries are more prone to find liability and to assess heavy damages against an insurance company alone than against an insured, and that the mere mention of insurance to a jury is a reversible error in practically all of the states of this union. He further notes that one of the principal reasons for plaintiffs bringing this type of action in the federal court in Louisiana is to obtain the prejudicial advantage afforded by the federal jury system and that to entertain such litigation is in direct conflict with the purpose of diversity jurisdiction which was designed to avoid possible discrimination in favor of a resident over a non-resident litigant.

the insurer is still *ex delicto*, a suit for damages for personal injuries. Reeves v. Globe Indemnity Co., supra. Instead of the injured party being substituted as a party plaintiff in the place of the insured, it is more realistic to say that the insurer is substituted as a party defendant in the place of the insured. The overall effect of the statute, of the accident, and of the suit is to compensate the injured person by damages paid out of an asset provided by the insured.

By virtue of written provisions in its Code, Louisiana has a limited jurisdiction akin to equity in some cases "where there is no express law" or "where positive law is silent", LSA-Civil Code Art. 21. It does not have the "common law" and "equity" systems established in other states. Le Blanc v. City of New Orleans, 138 La. 243, 70 So. 212, 217; Hyman v. Hibernia Bank & Trust Co., 139 La. 411, 71 So. 598, 603; Osborn v. City of Shreveport 143 La. 932, 79 So. 542, 545, 3 A.L.R. 955; Southern Bell Telephone & Telegraph Co. v. Louisiana Public Service Commission, 183 La. 741, 164 So. 786, 790.

The Louisiana direct action statute seems intended to produce the results permitted in common law states by statutes like, for example, the Alabama statute, Alabama Code 1940, Title 28, Sec. 12, where "the judgment creditor may proceed in equity against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment." See also 19 Am. Jur., Equity, Sec. 188; 8 Appleman's Ins. Law & Practice, Sec.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No.

LUMBERMENS MUTUAL CASUALTY COMPANY
Petitioner

vs.

FLORENCE R. ELBERT
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lumbermens Mutual Casualty Company prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above entitled case on the 29th day of January, 1953.

OPINIONS BELOW

The opinion of the district court on motion to dismiss is reported at 107 Fed. Supp. 299. Its opinion on

IN THE

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OCTOBER TERM, 1954

No. 11

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Petitioner

versus

FLORENCE R. ELBERT
Respondent

ORIGINAL BRIEF ON BEHALF OF PETITIONER

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AUTHORITIES

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ORIGINAL BRIEF ON BEHALF OF PETITIONER

OPINIONS BELOW

The opinion of the district court on motion to dismiss is reported at 107 Fed. Sup. 299. Its opinion on rehearing is reported at 108 Fed. Sup. 157. The opinion of the Court of Appeal for the Fifth Circuit is reported at 201 Fed. (2) 500. Its opinion on rehearing is reported at 202 Fed. (2) 744.

JURISDICTION

The original opinion of the Court of Appeal was rendered January 29, 1953, and judgment entered. The appellee (petitioner herein) timely filed an application for

rehearing on February 18, 1953, which was denied March 17, 1953 . Invoking the jurisdiction of this Court under the provisions of 28 USC 1254(1), a petition for certiorari was filed June 13, 1953, and was granted May 17, 1954.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1.

Article III, Section 2 of the Constitution of the United States:

> "*The judicial power shall extend to all cases, in law and equity,* arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all case affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; *between citizens of different states;* between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof and foreign states, citizens or subjects." (emphasis ours)

2.

Title 28 USC, Section 1332(a):

> "The district courts shall have original jurisdiction of all civil actions *where the matter in controversy*

exceeds the sum of value of $3,000.00 exclusive of interest and costs, and *is between:*

"(1) *citizens of different states.*"
(emphasis ours)

3.

Louisiana Civil Code, Article 2315:

"Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it:*****"

4.

Louisiana Revised Statutes 22:655:

"No policy or contract of liability insuurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against

both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State."

QUESTIONS PRESENTED

The basic questions presented are:

1.

Is the real matter in controversy actually between citizens of different states such as vests jurisdiction in the federal court on the grounds of diversity, where a citizen of Louisiana proceeding under a statute of the State of Louisiana institutes a direct action against a foreign public liability insurer of another citizen of Louisiana to recover damages as the result of an act of negligence committed in Louisiana by the Louisiana assured? This question in turn involves the following subsidiary questions:

(a) Is the insured in such action an indispensable party?

(b) Should the federal court accept jurisdiction on the grounds of diversity of citizenship of parties where the court cannot do final and complete justice and the controversy may be left in such a condition that its final termination may be wholly inconsistent with equity and good conscience?

2.

Should such effect be given by the federal courts to an act of the legislature of Louisiana as would result in citizens of Louisiana being afforded an unfair and prejudicial advantage over nonresident litigants by invoking the jurisdiction of the federal court on the grounds of diversity of citizenship? This question in turn involves the following subsidiary questions:

(a) Are those provisions of the Louisiana R. S. 22:655 granting an injured party the right to sue a public liability insurer alone purely procedural and, if so, are they applicable in a federal court action?

(b) Should the federal court entertain jurisdiction on the grounds of diversity where such diversity as exists arises only by virtue of a state statute and where the proceedings in the federal court lead to a result substantially different from that which would be attained in the state court?

(c) Should the federal court exercise diversity jurisdiction where to do so would be prejudicial to the public interest and would not show proper regard for the rightful independence of state government in carrying out their domestic policy?

STATEMENT OF CASE

On February 21, 1951, Mrs. Florence R. Elbert, *a resident and citizen of Shreveport, Louisiana*, was injured after she had alighted from an automobile which had been brought to a stop in front of her home *in Shreveport, Louisiana*. The automobile was owned by Mr. S. W. Bowen, *a resident and citizen of Shreveport, Louisiana*, and at the time was being operated by his wife, Mrs. S. W. Bowen, *a resident and citizen of Louisiana*.

The Lumbermens Mutual Casualty Company had issued to Mr. S. W. Bowen a contract of public liability insurance covering the vehicle owned by him and driven by his wife under which said company obligated itself to pay on behalf of the insured those sums which the insured should become legally obligated to pay as damages because of bodily injuries arising out of the ownership, maintenance and use of the insured vehicle.

Under date of December 4, 1951, Mrs. Florence R. Elbert instituted the present action directly against Lumbermens Mutual Casualty Company alone. The jurisdiction of the federal court was urged upon the basis that the matter in controversy was between citizens of different

states (Title 28 USC Sec. 1332(a)). The institution of the action by the plaintiff against the public liability insurer alone was brought under the provisions of Louisiana Revised Statutes 22:655.

The Lumbermens Mutual Casualty Company moved to dismiss the action urging that the provisions of the Louisiana Revised Statutes 22:655 were procedural and, therefore, not applicable in the federal court and further that proper diversity of citizenship between the parties did not actually exist since the real matter in controversy was the determination of whether or not Mrs. S. W. Bowen, a citizen of Shreveport, Louisiana, had committed an act of negligence in Shreveport, Louisiana which had resulted in an injury to the plaintiff who was also a citizen of Louisiana.

The district court upheld the defendant's motion to dismiss with an opinion holding that to sustain diversity jurisdiction there must exist an actual, substantial controversy between citizens of different states; that in considering between whom the actual controversy existed the court must determine the principal purpose of the suit and the primary and controlling matter in dispute. Applying these principles the court concluded that it was obvious that the primary, controlling matter in dispute was the determination of the rights of the plaintiff, a citizen of Louisiana, against the alleged tort feasor, a citizen of Louisiana, under the cause of action created by Article 2315 of the Revised Civil Code of Louisiana (R 11-26, 107 Fed. Sup. 299).

The plaintiff filed a motion for rehearing which was overruled by the district court with an opinion further emphasizing that the only cause of action existing in favor of the plaintiff under the laws of Louisiana as the result of an alleged tort arises under Article 2315 of the Louisiana Revised Civil Code and that the actual and real controversy involved was the determination of the the issue of negligence as between the plaintiff and the driver of the automobile, both citizens of Louisiana (R 28-41, 108 Fed. Sup. 157).

The plaintiff appealed from the judgment of the district court sustaining defendant's motion to dismiss. The court below reversed the decision of the district court and ordered the case remanded without making any comment upon, or disposing of, the contentions and principles advanced by the district judge in his two written opinions and by the appellee in support of the decision of the district court. The court below merely declared that "upon principle and authority" the judgment of the district court was wrong and should, therefore, be reversed. Just what "principles" were relied upon were not stated and the only "authority" indicated by the court were three decisions previously rendered by that court, all of which had been considered and discussed at length in the opinion of the district court and none of which had discussed or considered the issues upon which the district court had based its conclusions (R 46-47, 201 Fed. Rpr. (2) 500).

The appellee in the court below timely filed an application for rehearing which was refused by a majority

of the court without any further written reasons. Judge Rives, however, dissented with written reasons (R 51-60, 202 Fed. Rpr. (2) 744). Judge Rives took note of the fact that suits by an injured party directly against an insurer may operate justly under the civil law of Louisiana where the appellate court has the right and the duty to review both the law and the facts in all civil cases and render judgment on their own findings without regard to the holding of a trial jury, but that in the federal courts such procedure cannot be followed; that it has been repeatedly recognized that juries are more prone to find liability and to assess heavy damages against an insurance company alone than against an insured, and that the mere mention of insurance to a jury is a reversible error in practically all of the states of this union. He further notes that one of the principal reasons for plaintiffs bringing this type of action in the federal court in Louisiana is to obtain the prejudicial advantage afforded by the federal jury system in cases of this nature, and that to entertain such litigation is in direct conflict with the purpose of diversity jurisdiction which was designed to avoid possible discrimination in favor of a resident over a non-resident litigant. He concluded that federal jurisdiction should be denied or declined because, "First, it involves the unconstitutional assumption of jurisdiction over controversies between citizens of the same state of Louisiana. Second, if not actually equitable in nature, the rights and procedure are so closely akin thereto that the same principles should be applied by the federal courts as in equity suits, and it should be held (a) that the insured is an indispensable

party defendant, and (b) that in the exercise of their sound discretion in matters prejudicial to the public interest and which threaten the rightful independence of state governments in carrying out their domestic policy, the federal courts should decline to exercise jurisdiction against the insurer alone."

The Lumbermens Mutual Casualty Company filed a petition for certiorari in this Court which was granted.

SUMMARY OF ARGUMENT

1.

The courts of the United States were created under the provisions of Article III of the Constitution and Section 2 thereof defines and limits their power and jurisdiction. A review of the arguments advanced in support of the acceptance by the states of those provisions of our Constitution show that the principal reason for vesting diversity jurisdiction in the federal courts was to afford a non-resident citizen a fair, unprejudiced and unbiased forum whenever he should become a litigant in a state other than his own. *The Historic Basis of Diversity Jurisdiction, 41 Harvard Law Review 483.*

2.

It is recognized that the policy of the statute (Title 28 U.S.C., Section 1332(a)) conferring jurisdiction on the ground of diversity of citizenship calls for its strict construction. Whether a case falls within the proper ob-

jects of the diversity jurisdiction must be ascertained from the "principal purpose of the suit" and "the primary and controlling matter in dispute." *City of Indianapolis et al vs. Chase National Bank, 314 U.S. 63, 86 Law. Ed. 47.* The purpose of the statute has been to close the federal courts to litigants who properly should litigate their controversies in state tribunals. *Steinberg vs. Toro, 95 Fed. Sup. 791 at 795.*

3.

The instant action is an ordinary personal injury suit wherein the plaintiff, a Louisiana citizen, seeks to have it judicially determined that the alleged tortfeasor, a Louisiana citizen, is legally obligated to pay damages as the result of an accident which happened in the State of Louisiana. This cause of action arises under *Louisiana Civil Code Article 2315* which provides that every act of man which causes damage "*obliges him by whose fault it happened*" to become responsible.

The Louisiana Direct Action Statute (L.R.S. 22:655) does not create any new basis for a tort action but merely provides that the injured person may have *a right of* direct *action* against the insurer within the terms and limits of the policy. *Reeves vs. Globe Indemnity Company of New York, 182 La. 905, 162 So. 724; Burke vs. Mass. Bonding & Insurance Company, 209 La. 495, 24 So. (2) 875.*

It is thus seen that the principal purpose of this suit and the primary and controlling matter in dispute involves a controversy between plaintiff and the alleged

tort-feasor, both Louisiana citizens. "*****it is perfectly clear that the insurance company in this case was not a primary wrong-doer in the sense of having directed or authorized, or brought about the commission of the tort, and at common law the cause of action against it and its insured would not have been a joint one****there is only one primary controversy in this case, whether or not plaintiff has been injured by the cupable act of the insured.***" *Lake vs. Texas News Company, 51 Fed. (2) 862 at 864 C.A. 5.*

4.

The purpose of diversity jurisdiction in the federal courts is to guard against possible discrimination by the state courts in favor of resident over non-resident litigants. *Am. Juris. Vol. 54, par. 57, pp. 710.* To hold that the Louisiana statute is sufficient to create federal jurisdiction is to defeat this very purpose. Louisiana citizens bringing a direct action against a public liability insurer alone before a jury in a federal court have a definite prejudicial advantage over the non-resident litigant. The mere mention of insurance to a jury is reversible error in most jurisdictions. *4 ALR(2) 761.* Such information is considered irrelevant, *Lee vs. Osmundson, 289 NW 63, S. Ct. Minn.;* to influence jurors to bring in verdicts based on scanty evidence, *Lavigne vs. Ballantyne, 17 Atl. (2) 845, S. Ct. R.I.;* encourages jurors to assess higher damages, *Buehler vs. Festus Mercantile Company, 119 SW(2) 961, S. Ct. Mo.;* and prevents the jury because of passion and prejudice from deciding the case strictly on the merits, *White vs. Makela, 8 NW(2) 123, S. Ct. Mich.*

5.

Final and complete justice cannot be rendered in actions of this sort unless the tort-feasor is a party to the proceedings. There is always two matters to be determined; the tort-feasor's responsibility to the plaintiff and the insurance company's responsibility to the tort-feasor. If the tort-feasor is not a party the court's decision on this latter question is certainly not binding upon him. Should the insurer in one of these actions deny both that the tort-feasor was guilty of negligence and aiso that their contract of insurance was in force and a federal jury return a "verdict for the defendant" there would be nothing to prevent the plaintiff from bringing a similar action in the state court against the tort-feasor alone who in turn could call upon his insurer to defend and assume responsibility. If it were otherwise the tort-feasor would be deprived of his rights without having had the opportunity of a hearing.

6.

Under the law of Louisiana the appellate courts have the right and the duty to review both the law and the facts in all civil cases and to determine for themselves, without intervention of a jury, the ultimate facts upon which their final decision will rest. *Louisiana Constitution of 1921, Article 7, Sections 10, 29; Parsons vs. Bedford, 3 Pet. 433 at 449, 7 Law. Ed. 732 at 737.* The federal courts, on the other hand, are forbidden to re-examine any fact tried by a jury otherwise than according to the rules of common law. *Wright vs. Paramount-Richards*

Theatres, 198 Fed. (2) 303, C.A. 5. It is thus seen that the prejudice and bias that exists against an insurance company in the minds of a lay jury is rectified by trained experienced jurists reviewing the evidence and making their independent findings of fact if the case is tried in the state court, but such is not done, nor possible, under the federal system. Obviously a substantially different result is obtained in the federal court, as Judge Rives observed (R-52) "this court would be naive not to realize that that factor has much to do with the bringing of most of the automobile damage suits in the federal courts rather than in the state courts of Louisiana."

In diversity cases the rights enjoyed under local laws should not vary because of enforcement in a federal court. *Reagan vs. Merchants Transfer & Warehouse Company, 337 U.S. 530, 93 Law. Ed. 1520* and the outcome of such litigation should be substantially the same as it would be if tried in a state court. *Guaranty Trust Company vs. York, 326 U.S. 96, 89 Law Ed. 2079.*

These cases involve matters of a purely local nature and in the proper administration of justice the federal court may and should decline jurisdiction. *Burford vs. Sun Oil Company, 319 U.S. 315, 87 Law. Ed. 1424.*

ARGUMENT

MAY IT PLEASE THE COURT:

PRELIMINARY STATEMENT

This is an action brought by a citizen of Louisiana against a non-resident insurance company seeking to re-

cover damages suffered as a result of alleged acts of negligence committed in the State of Louisiana by a citizen of Louisiana to whom the non-resident insurance company had issued a contract of public liability insurance. As pointed out by the opinion of the district court (R11 at 15, 107 Fed. Sup. 299 at 302) this is merely one of a large number of similar suits filed in the federal district courts of Louisiana which has doubled the work of that court, all of said suits being by citizens of Louisiana alleging that the controversy is between citizens of different states.[1] Judge Rives of the Fifth Circuit in his dissenting opinion recognized "that there is something fundamentally wrong with our legal theories when they permit the great bulk of the casualty damage suit litigation of Louisiana to clog the dockets of the federal courts." (R51, 202 Fed. Rpr. (2) 744, C.A. 5).

In this action, as well as the many other similar ones, complainant's only basis for jurisdiction in the fed-

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Footnote [1]: This is illustrated by the records of the U.S. District Court, Western District of Louisiana, which show:

Year	Total No. of cases based on diversity	Direct Actions against Ins Co.
1951	221	119
1952	199	98
1953	239	125
1954 (Jan.-June)	166	84
Totals	825	426

(the opinion of the district court sustaining this motion was rendered in September of 1952. During the months of October, November and December of 1952 there were only 8 direct action cases out of a total of 28 diversity cases filed.)

eral court is under the provisions of Title 28 U.S.C., Section 1332(a) which declares:

> "The district courts shall have original jurisdiction of all civil actions where *the matter in controversy* exceeds the sum or value of $3,000.00 exclusive of interest and costs, and *is between:*
>
> "(1) *Citizens of different states.*"
> (emphasis ours)

HISTORY OF DIVERSITY JURISDICTION

Before we examine the provisions of the Louisiana statute involved and consider its application to the instant problem, let us refresh our minds on the source from which the courts of the United States derive their existence and the rights and powers delegated to those courts.

Article III of the Constitution of the United States provides for the creation of the federal courts, and Section 2 thereof defines and limits their power and jurisdiction as follows:

> "The judicial power shall extend to all cases, in law and arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under

> grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

Title 28 U.S.C. Section 1332(a) referred to hereinabove is the act by which congress vests the federal courts with such jurisdiction as congress deemed proper within the limits of the constitutional provisions.

Alexander Hamilton stated in his essay addressed to the people of the State of New York in support of the proposed constitution:

> "To judge with accuracy of the proper extent of the federal judicature, it will be necessary to consider, in the first place, *what are its proper objects.*" (emphasis ours)
>
> *The Federalists No. 80*

It is quite obvious from the arguments advanced by Hamilton and by the other advocates of the national courts that the principal reason for vesting diversity jurisdiction in the federal courts (if not the sole reason) was to afford a non-resident citizen a fair, unprejudiced and unbiased forum whenever he should become a party to a suit in a state other than his own.

> See: *The Historic Basis of Diversity Jurisdiction, 41 Harvard Law Review 483*

It is interesting to note that the suggestion of giving this jurisdiction to the federal judiciary met with strenuous opposition from the Anti-Federalists (a faction which

would be referred to as "States-Righters" today). Patrick Henry, for instance, stated:

> "I see arising out of that paper, a tribunal, that is to be recurred to in all cases, when the destruction of the state judiciaries shall happen; and from the extensive jurisdiction of these paramount courts, the state courts must soon be annihilated."
>
> *The Historic Basis of Diversity Jurisdiction (supra) at page 489*

The author in the above mentioned law review article points out at page 308 that:

> "During the debates in the state conventions there had been frequent assurances that congress would prevent the dire consequences which the Anti-Federalists had been arising from the judiciary clause."

It is further observed that in the early application of these provisions the Supreme Court was fully cognizant that "*there was no reason for taking over business which the state courts could handle without serious prejudice to any national interest.*" It was never intended that this jurisdiction encompass matters between citizens of the same state. Alexander Hamilton in the essay mentioned was careful to point out that cases between citizens of the same state claiming lands under grants of different states "***are the only instances in which the proposed constitution directly contemplates the cognizance of disputes between the citizens of the same state.*"

In the early landmark case of *Bank of United States vs. Deveaux, 5 Cranch 61 at page 87*, Chief Justice Marshall stated:

> "The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it, where it is not conferred, are of equal obligation. The constitution, therefore, and the law, are to be expounded without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws."

Before ending our brief discussion of the historical background of diversity jurisdiction, it must be observed that the fears of Patrick Henry and the Anti-Federalists have not disappeared with the passage of time but that since 1878 vigorous attempts have been made to limit this jurisdiction or to abolish it completely and that such legislation as introduced by Senator Norris in the 71st and 72nd congress designed to eliminate jurisdiction of suits between citizens of different states was favorably reported out each time by the senate judiciary committee.

56 Harvard Law Review 1226 et seq.

THE APPLICATION AND INTERPRETATION OF THE DIVERSITY JURISDICTION CLAUSE

An ever alert appreciation of the "proper objects" of the federal judicature and the stormy background of its creation have undoubtedly had an indelible effect upon our courts in their interpretation and application of the diversity jurisdiction provisions. It is a well recognized and established principle that:

"The policy of the statute conferring jurisdiction on the ground of diversity of citizenship calls for its strict construction, and the right to sue in a federal court on this ground must be exercised within the limits established. The intent of congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been vigorously enforced by the courts.****

"Congress granted jurisdiction to the federal courts in diversity of citizenship cases to guard against possible discrimination by state courts in favor of resident over-non-resident litigants.*****"

American Jurisprudence Vol. 54, par. 57, page 710

The principles announced by this Court in the case of *City of Indianapolis et al vs. Chase National Bank, 314 US 63, 86 L. Ed. 47* illustrate the strict inquiry which should be made in determining if a case falls within the "proper objects" of the diversity jurisdiction provisions. There the Court stated:

"To sustain diversity jurisdiction there must exist an 'actual', Helm vs. Zarecor, 222 US 32, 36, 56 L Ed. 77, 80, 32 S. Ct. 10, 'substantial,' Niles-Bement-Pond Co. vs. Iron Moulders Union, 254 US 77, 81, 65 L. Ed. 145, 48, 41 S. Ct. 39, controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. Strawbridge vs. Curtiss, 3 Cranch (US) 267, 2 L. Ed. 435. Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our

duty, as it is that of the lower federal courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.' Dawson vs. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 US 178, 180, 49 L. Ed. 713, 715, 25 S. Ct. 420. Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary 'collision of interest,' Dawson vs. Columbia Ave. Sav. Fund, S. D. Title & T. Co., supra, at 181, exists, is therefore not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit,' East Tennessee, V. & G. R. Co. vs. Grayson, 119 US 240, 244, 30 L. Ed. 382, 383, 7 S. Ct. 190, and the 'primary and controlling matter in disputes,' Merchants' Cotton Press & Storage Co., vs. Insurance Co. of N. A. 151 US 368, 385, 38 L. Ed. 195.*****"

The Court went on to say, in holding that the *actual controversy* required a realignment of parties:

"This is not a sacrifice of justice to technicality. For the question here is not whether Chase and Indianapolis Gas may pursue what they conceive to be just claims against the City, but whether they may pursue them in the federal courts in Indiana rather than in its state courts. The fact that Chase prefers the adjudication of its claims by the federal court is certainly no reason why we should deny the plain facts of the controversy and yield to illusive artifices. Settled restrictions against bringing local disputes into the federal courts cannot thus be circumvented.

"These requirements, however technical seeming, must be viewed in the perspective of the constitutional limitations upon the judicial power of the

federal courts, and of the Judiciary Acts in defining the authority of the federal courts when they sit, in effect, as state courts. See Madisonville Traction Co. vs. St. Bernard Min. Co., 196 US 239 255, 49 L. Ed. 462, 468, 25 S. Ct. 251, and Ex parte Schollenberger, 96 US 369, 377, 24 L. Ed. 853, 854. The dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business. See Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harvard L. Rev. 483, 510; Shamrock Oil & Gas Corp. vs. Sheets, 313 US 100, 108, 109, 85 L. Ed. 1214, 1219, 61 S. Ct. 868; Healy vs. Ratta, 292 US 263, 270, 78 L. Ed. 1248, 1253, 54 S. Ct. 700. 'The policy of the statute (conferring diversity jurisdiction upon the district courts) calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of the controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution*** Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' Healy vs. Ratta, supra (292 US at 270, 78 L. Ed. 1253, 54 S. Ct. 700). In defining the boundaries of diversity jurisdiction, this Court must be mindful of this guiding Congressional policy. See Hepburn & Dundas vs. Ellzey, 2 Cranch (US) 445, 2 L. Ed. 332; New Orleans vs. Winter, 1 Wheat. ('S) 91, 4 L. Ed. 44; Morris vs. Gilmer, 129 US 315, 328, 329, 32 L. Ed. 690, 694, 695, 9 S.

Ct. 289; Susquehanna & W. Valley R. & Coal Co. vs. Blatchford, 11 Wall. (US) 172, 20 L. Ed. 179; Shamrock Oil & Gas Corp. vs. Sheets, 313 US 100, 85 L. Ed. 1214, 61 S. Ct. 868; and compare Grant ex dem. Meredith vs M'Kee, 1 Pet. (US) 248, 7 L. Ed. 131; Elgin vs Marshall, 106 US 578, 27 L. Ed. 249, 1 S. Ct. 484; Healy vs Ratta, 292 US 263, 78 L. Ed. 1248, 54 S. Ct. 700; McNutt vs General Motors Acceptance Corp., 298 US 178, 80 L. Ed. 1135, 36 S. Ct. 780."

A further indication of the "proper objects" of the federal judicature as conceived by Congress is noted in the provisions of *28 U. S. C. Section 1339* wherein it is provided:

"A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

As pointed out in *Cyclopedia of Federal Procedure, Second Edition, Vol. 1, page 457* the foregoing quoted clause is designed to prevent assignments to give jurisdiction where the assignor could not sue. The instant case does not present improper assignment, but we suggest that a state statute should not be given such effect as to accomplish what the parties themselves could not have done.

In the case of *Steinberg vs. Toro, 95 Fed. Supp. 791 at page 795, D. Puerto Rico*, the Court observed:

"Congress in conferring jurisdiction upon the federal courts to entertain suits between citizens of

the different states intended that when a citizen of one state sought to enforce or protect a right against a citizen of another state he should be entitled to invoke the jurisdiction thus conferred upon the federal courts as a matter of right. When a suitor comes within the requirements of diversity jurisdiction he should be able to successfully invoke it whatever his reasons and a refusal to exercise jurisdiction in such cases would thwart the very purpose for which such jurisdiction was conferred. *However, the federal courts are courts of limited jurisdiction and it is elementary that Congress in conferring diversity jurisdiction upon them did not intend thereby to open those courts to suitors who by sham, pretense or fiction acquired an apparent or spurious status that would enable them to invoke federal jurisdiction.* It was in recognition of this limited nature of the diversity jurisdiction of the federal courts that Congress since the earliest days has enacted legislation designed to prevent suitors from invoking that jurisdiction through the collusive creation of the right to invoke such jurisdiction by a transferror who could not have so invoked that jurisdiction.

"The clear purpose of that legislation has been to close the federal courts to litigants who properly should litigate their controversies in state tribunals except where there exists a real diversity of citizenship. And it is within the purview of such congressional intent that *the federal courts not only should prevent unauthorized incursions upon their jurisdiction but that they should be alert to ascertain and to aggressively defend against any attempted invasions of their diversity jurisdiction.*"
(emphasis ours)

The fact that diversity jurisdiction is granted the federal courts "to guard against possible discrimination by state courts in favor of resident over non-resident litigants is clearly emphasized by the statutes and jurisprudence dealing with the removal of cases. *Title 28, U.S. C. Section 1441* provides that removal from state courts to federal courts may be *by the defendant.* As stated by Judge Holmes in the case of *Sheets vs. Shamrock Oil & Gas Corp., 115 Fed. (2) 880 at page 883, C.A. 5:*

> "Only defendants may remove, either on the ground of a federal question or by reason of diversity of citizenship. *In cases of diversity the right is given only to non-resident defendants.*" (emphasis ours)

The reason for such a restriction is quite apparent. No one can claim to be prejudiced when he is sued in the court of his own residence and domicile.

COMPLAINANT'S ACTION AND THE APPLICABLE LOUISIANA STATUTES

The instant suit is nothing more than the usual common garden variety personal injury action. The plaintiff, Mrs. Florence Elbert, alleged that Mrs. S. W. Bowen, the driver of a vehicle from which she had just alighted, committed certain acts of negligence which resulted in injuries for which she seeks damages. Under the law of Louisiana the sole and only basis for such a claim arises by virtue of the provisions of *Louisiana Civil Code Article 2315* which stipulates:

> "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it*****"

We call Your Honors particular attention to the fact that this codal provision by its express terms *"obliges him by whose fault it happened"* to become responsible for such damages as may have resulted.

The instant action is brought by complainant against the Lumbermens Mutual Casualty Company alone as the liability insurer of Mrs. S. W. Bowen under the provisions of *Louisiana Revised Statute 22:655* which have been hereinbefore set forth in full.

We direct the Court's attention to the fact that the Louisiana Direct Action Statute does not create any new basis for a person injured by the negligence of another to seek damages but it merely provides that "the injured person***shall have *a right of direct action* against the insurer *within the terms and limits of the policy*****." This principle has been consistently recognized by the courts of Louisiana. In the case of *Reeves vs. Globe Indemnity Company of New York, 182 La. 905, 162 So. 724* the Supreme Court of the state through the now Chief Justice Fournet said:

> "The plaintiff exercised her statutory optional right to institute this suit against the defendant alone rather than jointly and in solido against the defendant and King (assured). However, that fact did not change the nature of the action from one ex delicto to an action ex contractu. *The cause that*

gave rise to the right of action has not been changed, nor does the statutory right of action against the defendant change the nature of the demand." (emphasis ours)

In *Ruiz vs. Clancy, 182 La. 935, 162 So. 734*, one of the landmark cases in the Louisiana jurisprudence interpreting the effect of this direct action statute the late Chief Justice O'Niell stated:

"An insurance company therefore, may — as the company did in this instance — limit the coverage, or liability of the company, to the obligation to pay only such sums as the insured shall become obligated to pay by reason of the liability imposed upon him by law. The attorney for the insurance company contends that the statute would interfere with the freedom of parties to enter into contracts, and would be therefore unconstitutional, if it forbade insurers to limit their so-called coverage, in liability insurance policies, so as to cover only the legal liability of the insured. The statute does not purport to do that****.

"It's virtually conceded, therefore that****(plaintiffs)****have no cause or right of action against the insurance company unless they have a cause of action against****(the insured)."

The Chief Justice further observed:

"With regard to the merits of a claim against an insured, the statute does not give the claimant a right of action against the insurance company unless the claim against the insured is well founded in law."

See also *Mock vs. Maryland Casualty Company, 6 So. (2) 199*

In the case of *Burke vs. Massachusetts Bonding & Insurance Company, 209 La. 495, 24 So. (2) 875*, the Court asserted:

> "But the statute merely gives a claimant a direct right of action against the liability insurer when he has a cause of action against the insured.****"

A thorough consideration of the opinions rendered by the Supreme Court of Louisiana will show that it is definitely recognized that the Louisiana Direct Action Statute does not prevent an insurer from stipulating that *it shall only be obligated to pay such sums as the insured shall become legally obligated to pay by reason of the liability imposed upon HIM by law.* Subsequent to the above mentioned interpretations of the Statute by the courts, the legislature of Louisiana has re-enacted the Statute several times without making any change as to contracts issued within the State of Louisiana (Act 55 of 1930, Act 541 of 1950). The established rule of statutory construction that where a statute has been re-enacted without change, the interpretation which has been placed upon it by the Supreme Court must be considered as having been adopted along with it, is recognized by the courts of Louisiana. *Lehman vs. Lehman, 130 La. 960, 58 So. 829.*

Keeping in mind the fact that the Direct Action Statute does not "change the cause of action" which arises in favor of the injured person and does not prohibit the insured from limiting its liability "so as to cover only

the legal liability of the insured," let us examine the contract of insurance entered into by and between the Lumbermens Mutual Casualty Company and S. W. Bowen under which the complainant herein seeks to recover. What are the pertinent "terms and limits" of that contract? We find that the company obligates itself "to pay on behalf of the insured all sums *which the insured shall become legally obligated to pay* as damages because of bodily injury****."

IS THIS ACTION ONE OF THE "PROPER OBJECTS" OF THE FEDERAL JUDICATURE?

Turning now to the basis upon which complainant seeks jurisdiction of the federal court, we again consider the provisions of Title 28 U.S.C. Section 1332(a). We see there that the jurisdictional requirements demand that *the matter in controversy* must be between citizens of different states.

Let us be practical and approach the matter as suggested by this Court in the case of *City of Indianapolis et al vs. Chase National Bank, 314 U.S. 63, 86 Law Ed. 47* and disregard the "mechanical rules" and ascertain "the principal purpose of the suit and the primary and controlling purpose of the suit and the primary and controlling matter in dispute." In applying these fundamental principles the district judge immediately and correctly recognized that this case does not present a matter in controversy between *the plaintiff and the insurance Company.* The company's liability under its contract with the insured becomes fixed once the insured has been found to

be legally obliged to pay the plaintiff damages. "Until that is done, the cause of action created by Article 2315 of the Civil Code, in favor of the plaintiff, growing out of the fault constitute the 'primary and controlling matters in dispute'." (District Court opinion R-20)

The purpose of this suit is to establish that Mrs. Bowen, a citizen of Louisiana, negligently injured Mrs. Elbert, a citizen of the same state. There are no allegations in the complaint of any acts of negligence on the part of the Lumbermens Mutual Casualty Company which would give rise to a claim for damages under the Louisiana codal provisions. If this matter were to be tried, the jury would not be called upon to determine if this defendant committed acts of actionable negligence but would be asked to find whether or not Mrs. Bowen had acted in such a manner as *to render her liable* for damages.

A very analogous situation was considered in the case of *Lake vs. Texas News Company, 51 Fed. (2) 862, C.A. 5.* In that action the defendant insurance company attempted to remove a case from the state court to the federal court on the grounds that, as between the plaintiff and the insurer, there existed a "separate controversy."

Judge Hutcheson reasoned (at page 864):

> "While, therefore, it is perfectly clear that the insurance company in this case was not a primary wrongdoer in the sense of having directed or authorized, or brought about the commission of the tort, and at common law the cause of action against it and its insured would not have been a joint one, it seems

plain to me that there *is only one primary controversy in this case, whether or not plaintiff has been injured by the culpable act of the insured.*****

* * * * * * * *

"For here, in fact and I think in law, is only one controversy.*****"

The court below reversed the district judge and disposed of the issues presented by merely stating "plaintiff is here insisting that upon principle and authority, and particularly upon that of our cases cited in the note *(New Amsterdam Casualty Company vs. Soileau, 167 Fed. (2) 767; Fisher vs. Home Indemnity Company, 198 Fed. (2) 218; Cushing vs. Maryland Casualty Company, 198 Fed. (2) 536)* the judgment was wrong and must be reversed. We agree *****." (R-47)

We are at a complete loss as to the "principle" to which the court below referred and further submit that the authorities cited not only did not pass judgment upon the contentions advanced but did not even consider these issues.

The pricipal authority relied upon by complainant and the court below is the decision rendered by that court in the case of *New Amsterdam Casualty Company vs. Soileau, 167 Fed. (2) 767.*

A careful study of that case shows that from beginning to end the question which was being considered was whether the direct action statute was procedural or substantive. In the Soileau case the Court held that it

was *both* procedural and substantive. We cannot complain of that conclusion. It is obvious that the statute does include some substantive provisions of law; this is made apparent by examining the Act from its very beginning. The original act was 253 of 1918 of the Legislature of Louisiana which provided:

> "That, after the passage of this act, it shall be illegal for any company to issue any policy against liability unless it contains a provision to the effect that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy, and, in case of such insolvency or bankruptcy, an action may be maintained within the terms and limits of the policy by the injured person or his or her heirs, against the insurer company."

One of the principal reasons for such legislation was explained by Chief Justice Taft in the case of *Merchants Mutual Automobile Liability Insurance Company vs. Smart, 267 US 126, 69 Law Ed. 538* in discussing a New York statute similar to the Louisiana act of 1918:

> "Another reason for the legislation is ****that it was enacted***** to make impossible a practice of some companies to collude with the insured after an injury foreshadowing heavy damages had occurred, and to secure an adjudication of the insured in bankruptcy whereby recovery on the policy could be defeated because the bankrupt had sustained no loss."

In the above considered respect the Louisiana statute is certainly substantive, but it still remains that there is nothing either in the 1918 act or its successors which changes the cause of action which exists in favor of the injured person. This conclusion is emphasized by the assertions of the Louisiana Supreme Court in the case of *West vs. Monroe Bakery, 217 La. 189, 46 So. (2) 122* wherein the Court held that actions instituted by an injured party under the statute were "subject only to such defenses *as the tort-feasor himself may legally interpose.*" (emphasis ours)

Further evidence showing that it is the cause of action which exists in favor of the injured person as against the actual tort-feasor is found in the fact that the direct action must be brought at the domicile of the tort-feasor or where the accident happened and cannot be maintained at the domicile of the insurance company. *Miller vs. Commercial Standard Insurance Company, 199 La. 515, 6 So. (2) 646.*

The Court in the Soileau case at no point indicates that it made any examination into the question as to whether or not the *matter in controversy* was between citizens of different states. All that was said by that Court bearing in any manner upon the question of diversity jurisdiction was as follows:

> "The Act of 1918, as amended by the Act of 1930, makes the indemnity in favor of the insured inure to the benefit of the person who thereafter is injured by the negligence of the insured. Lawrason vs.

> Owners Automobile Insurance Company of New Orleans, supra, and Merchants Mutual Automobile Liability Insurance Company vs. Smart, supra. In other words, it subrogates the injured person to all the rights of the insured within the terms and limits of the policy. Where the asserted right of action arises by subrogation and not by assignment, the subrogated party may sue on such right in a federal court if there is diversity of citizenship between him and the defendant, though the original debtor and the defendant are citizens of the same state."

In both of the cases cited by the Court in the above quotation it must be noted that the claims of the injured party against the insured had been determined and the *matter in controversy* was the liquidation of the obligation which had been found to be imposed upon the insured. In such instances it is quite proper to say that the injured party is subrogated to the rights of the insured as against the insurer. Under the contract of insurance the insured has the right to call upon the insurer to pay such sums as he has been found obligated to pay to the injured person. Until he has been adjudged responsible to pay the injured party, what right has the insured as against his insurer? Other than to call upon the company to afford him counsel for his defense there is absolutely no right or cause of action vested in the insured until he has been condemned to pay!

> "Subrogation is not assignment. The most that can be said is that the subrogated creditor by operation of law represents the person to whose right he is subrogated."

City of New Orleans vs. Whitney, Adm., 138 U.S. 595, 34 Law Ed. 1102.

No one by any stretch of the imagination can believe that an injured person in instituting an action, against a public liability insurer, which calls for the determination of whether an insured is obligated to pay him damages as the result of the insured's alleged acts of negligence "represents the person (the insured) to whose right he is subrogated."

The other decisions cited, *Fisher vs. Home Indemnity Company, 198 Fed. (2) 218, C.A. 5* and *Cushing vs. Maryland Casualty Company, 198 Fed. (2) 536, C.A. 5*, also opinions of the court below, do not discuss at any point the issues which were presented by the instant case and are now up for consideration.

The most that can be said for the authorities cited by the court below is that that court had reached the conclusion that the Direct Action Statute of Louisiana was both substantive and procedural, but without defining wherein the Act is substantive and which part is procedural. This Statute is analogous to the provisions of Louisiana Civil Code Article 2334 and 2402. The Supreme Court of Louisiana in discussing those provisions said:

> "The right given by Articles 2334 and 2402 of the Civil Code to a married woman to claim damages for her personal injuries as her separate property and in her own name is *both* substantive and remedial. The declaration of the law that the right of action is her personal property is substantive,

> and the provision that it is recoverable by her 'alone' is remedial."
>
> *Matney vs. Blue Ribbon, 205 La. 505, 12 So. (2) 253*

We submit that the granting to the injured party of a right of action against the insurer is substantive and that those provisions in the Direct Action Statute providing that the injured person may sue the insurer and the insured, or either of them alone, are remedial and should affect only proceedings in the state courts.

In no event does this Statute change the fact that the true matter in controvery is the determination of rights between the injured party and the alleged tort-feasor.

THE ACCEPTANCE OF JURISDICTION IN CASES OF THIS NATURE IS IN DIRECT CONFLICT WITH THE PURPOSE OF THE DIVERSITY JURISDICTION

To maintain that the federal court is vested with jurisdiction in matters of this sort would require that the very purpose of, and the sole justification for, diversity jurisdiction be ignored.

> "Congress granted jurisdiction to the federal courts in diversity of citizenship cases to guard against possible discrimination by the state courts in favor of resident over non-resident litigants.****"
>
> *Am. Juris. Vol. 54, par. 57, page 710.*

If the direct action statute passed by the legislature of Louisiana is held to be sufficient to vest jurisdiction

in the federal court because of diversity of citizenship between the claimant and the insurance company, the reason for the existence of diversity jurisdiction is clearly defeated. No judge of any court can shut his eyes to the fact that an injured plaintiff has a definite advantage in trying his case before a jury where the defendant is an insurance company. The mere mention of insurance to a jury is reversible error in most of the states of this union. *4 ALR(2) 761.* The general rule that the existence of insurance is such information as should not be imparted to a jury is premised upon the idea that a jury will not or cannot bring in a fair verdict if they know that the defendant is insured against liability. The courts of this nation ascribe various reasons supporting that rule. In some courts it is merely considered to be irrelevant to the other issues involved. *Lee vs. Osmundson, 289 NW 63, S. Ct. of Minn.* In others, it is said to influence jurors to bring in verdicts based upon scanty evidence. *Lavigne vs. Ballantyne, 17 Atlantic (2) 845, S. Ct. of R.I.* And again it said that it encourages jurors to assess higher damages than they otherwise would. *Buehler vs. Festus Mercantile Company, 119 SW(2) 961, S. Ct. of Mo.* And it has been recognized that it prevents the jury because of passion and prejudice from deciding the case strictly on the merits. *White vs. Makela, 8NW(2) 123, S. Ct. of Mich.* The principle and the reasons therefor are well recognized. *Altenbaumer vs. Lion Oil Company, 186 Fed. (2) 35, C.A. 5.*

Complainants pointed out in the court below in support of their contentions that jurisdiction in cases of

this nature had been accepted by the federal courts in Louisiana for a number of years. We submit that the repeated commission of error, even by the courts of the United States, is no basis for the continuation of such error. In the famous case of *Erie Railroad vs. Tompkins, 304 US 64, 82 Law Ed. 1188* this Court announced:

> "Thus the doctrine of Swift & Tyson is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct'."

FINAL AND COMPLETE JUSTICE CANNOT BE RENDERED UNLESS THE TORT-FEASOR IS A PARTY TO THE PROCEEDINGS.

In actions of this nature there are always two questions which must be judicially determined; first, is the insured tort-feasor responsible for plaintiff's injuries; second, is the insurer responsible therefor. The latter of these two problems involves the determination of the rights and responsibilities existing between the tort-feasor and his insurer. If the tort-feasor is not a party to the proceedings such determination as is made certainly is not binding upon him. Judge Rives of the court below in his dissenting opinion recognized this pertinent point (R 57-59):

> "If the district judge and I are mistaken and diversity jurisdiction does exist, it seems to me that the insured is an indispensable party defendant. 'Whether parties are indispensable must be determined by the federal court according to federal rather than state rules, for the question of their jurisdic-

tion is one which the federal courts must determine for themselves.' *Ford vs. Adkins, 39 F.S. 472, 474.* See also *De Korwin vs. First National Bank of Chicago, 156 F. 2d 858; 3 Moore's Federal Practice* (2nd ed.) Sec. 19.07, pages 2152, 2153.

"The principles announced by Mr. Justice Curtis in *Shields vs. Barrow*, 17 How. 130, 136, as to when parties are indispensable are still sound despite the difficulty in application of those principles. See 3 Moore's Federal Practice, Sec. 19.07, page 2150. Among other tests, a person is an indispensable party if his presence is necessary to enable the Court to do complete and final justice between the parties before the court and, further, if the interest of the absent party is 'of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.' *Shields vs. Barrow, supra.* This court has said that 'the fact that the decree would not be technically binding on the absent parties is not the controlling factor.' *Keegan vs. Humble Oil & Refining Company*, 155 F. 2d 971, 973. In *California vs. Southern Pacific Company*, 157 U.S. 229, 255 the Supreme Court says:

" 'Irrespective, then, of the extent, technically speaking, of the effect and operation of a decree as to the seven parcels, based on that ground, as *res adjudicata*, it is impossible to ignore the inquiry whether the interests of persons not before the court would be so affected and the controversy so left open to future litigation as would be inconsistent with equity and good conscience.'

"While the injured person under the Act has a right of direct action against the insurer, the insured also has certain property rights in the insurance policy, viz. the insured has the right to be protected from liability to the (fol. 85) extent of the coverage of the policy, whether to the injured person or to some other person who has been or may be injured during the term of the policy.

"If the injured party sues the insured first and the insurer has notice of the litigation and an opportunity to control its proceedings, the insurer is bound by the determination of liability of the insured. 8 Applemar's Ins. Law & Practice, Sec. 4860, and cases cited. Whether the reverse holds true, that is, whether the insured would be bound by the determination of liability against his insurer, is a much more difficult question. See 29 Am. Jur., Insurance Sec. 1084; Annotations, 137 A. L. R. 1016, 121 A. L. R. 890; 50 C. J. S., Judgments, Sec. 789. If the insured is so bound, then obviously he is an indispensable party defendant for he may lose his counterclaim against the injured person or may be deprived of a part or all of his insurance protection without having his day in court.

"Even, however, if the judgment would not be technically binding on the insured as to the issue of liability, that fact is not the controlling factor in determining whether the insured is an indispensable party. *Keegan vs Humble Oil & Refining Company*, 155 F. 2d 971, and authorities there cited. The injured party, having failed in a suit against the insurer direct, might still sue the insured. The judgment in the first suit would not conclusively estop the injured party for the issues would be different and it might be that that judgment was based

on the failure of proof as to the existence and coverage of the policy, matters not involved in the suit against the insured. The injured party having recovered against the insured, the insured could then call on the insurer to pay the damages (fol. 86) and the fact that the insurer had successfully defended against the injured party would be no answer to the insured. The result follows that if the injured party is permitted to sue the insurer alone in the federal court, the court cannot do final and complete justice and the controversy may be left in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

THE TRIAL OF THESE CASES IN THE FEDERAL COURT LEADS TO A RESULT SUBSTANTIALLY DIFFERENT FROM THAT WHICH WOULD BE ATTAINED IN THE STATE COURT.

The trial of cases of this nature by jury is provided under the law of Louisiana *but the appellate courts have the right and the duty to review both the law and the facts in all civil cases. Louisiana Constitution of 1921, Article 7, Sections 10, 29.* The practice in the courts of Louisiana is well outlined in the opinion of Mr. Justice McLean in the case of *Parsons vs Bedford, 3 Pet. 433 at 449, 7 Law Ed. 732 at 737.* Thus it appears that in the application of the direct action statute the appellate courts of the state are not only entitled to, but are under a duty to, *review the evidence and to determine for themselves the facts* upon which their ultimate decision must rest and, if their conclusions do not coincide with that of the trial jury,

they make their own findings of fact and render judgment accordingly. These appellate judges being trained, experienced Louisiana jurists, the dangers which arise out of the direct action proceedings from the prejudice and bias against insurance companies which exists in the minds of the ordinary lay juror is thereby corrected. The federal courts, on the other hand, are forbidden to re-examine any fact tried by a jury otherwise than according to rules of the common law. *Wright vs Paramount-Richards Theatres*, 198 Fed. (2) 303, C.A. 5.

In the case of *Reagan vs Merchants Transfer & Warehouse Company*, 337 U.S. 530, 93 Law Ed. 1520, Mr. Justice Douglas pointed out that in diversity cases the rights enjoyed under local laws should not vary because enforcement of those rights was sought in the federal court rather than in the state court. Mr. Justice Frankfurter in *Guaranty Trust Company vs York, 326 U.S. 96, 89 Law Ed. 2079* declared that in such cases the outcome of the litigation in the federal court should be substantially the same as it would be if tried in a state court.

There is no doubt but that plaintiffs in these proceedings obtain an advantage in the federal court which does not exist under the state procedure. Judge Rives observed (R-52):

> "This court would be naive not to realize that that factor has much to do with the bringing of most of the automobile damage suits in the federal courts rather than in the state courts of Louisiana."

The matters involved in these actions are of a purely local nature. This Court has recognized that in the proper administration of justice the federal court may and should decline to exercise jurisdiction in such instances because the acceptance would be prejudicial to the public interest and would not show proper regard for the rightful independence of state governments in carrying out their domestic policy. *Burford vs. Sun Oil Compay, 319 U.S. 315, 87 Law Ed. 1424.*

The policy of Louisiana as to this type of action is well determined. Various attempts have been made to amend or repeal the statute, the most recent being House Bill 600 which was unsuccessfully introduced in the 1954 legislature. But it must also be recognized that it is equally the well settled desire of the Louisiana citizens that their appellate courts review and determine the facts in each of these cases. Efforts to change this procedure have also been rejected on various occasions by the legislature. Senate Bill 125 (1954 legislature) designed for that purpose was the latest unsuccessful attempt to have the Louisiana appellate courts bound by the findings of fact of their juries . The exercise of jurisdiction by the federal court in these cases would result in disregard of this established domestic policy of the State of Louisiana.

CONCLUSION

The courts of this nation are designed for the administration of justice and to afford all litigants a fair, unprejudiced and impartial hearing of their problems and

putes. If this function is to be properly carried out in es of this nature, the decision of the court below must reversed and the judgment of the district court sus- ning defendant's (petitioner herein) motion to dismiss lack of jurisdiction should be reinstated.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 11

LUMBERMEN'S MUTUAL CASUALTY COMPANY,
PETITIONER

vs.

FLORENCE R. ELBERT,
RESPONDENT

ORIGINAL BRIEF ON BEHALF OF MRS. FLORENCE R. ELBERT, RESPONDENT (ON PETITIONER'S MOTION TO DISMISS FOR LACK OF JURISDICTION)

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ORIGINAL BRIEF ON BEHALF OF MRS. FLORENCE R. ELBERT, RESPONDENT

The decision below, the statement of the jurisdiction of the Court and the statutes involved are set forth in Petitioner's brief and in its petition for certiorari and, therefore, are not included here except, for ready reference, the pertinent Louisiana statutes are repeated.

LOUISIANA STATUTES INVOLVED

1.

Louisiana Civil Code, Article 2315:

"Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; * * *"

2.

Louisiana Revised Statutes 22:655:

"No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be

urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State."

3.

Louisiana Civil Code Article 3045:

"The obligation of the surety towards the creditor is to pay him in case the debtor should not himself satisfy the debt; and the property of such debtor is to be previously discussed or seized, unless the security should have renounced the plea of discussion, or should be bound in solido jointly with the debtor, in which case the effects of his engagement are to be regulated by the same principles which have been established for debtors in solido."

QUESTION PRESENTED FOR REVIEW

Does the United States District Court, sitting in Louisiana, have jurisdiction to try a suit for damages for personal injury brought under the Louisiana direct action statute against the wrongdoer's insurer alone, where (a) the policy was applied for, issued and delivered in Louisiana, (b) the accident occurred in Louisiana, and (c) diversity of citizenship exists between the complainant and the defendant insurer but not between the complainant and the insured wrongdoer?

STATEMENT OF CASE

In addition to the statement contained in Appellant's brief, Respondent desires to make a short statement of the controlling material facts necessary for a decision here.

In Shreveport, Louisiana, on 21 February 1951, Respondent was injured while alighting from an automobile owned and operated by assured. Suit was brought against the insurer alone. From the pleadings (R. 1, 8), stipulation (R. 27) and policy (photostatic copy of original policy was sent up to this Court in its original form) (R. 27), all in the Transcript, the following facts are not in dispute:

1. The accident occurred in Louisiana.

2. The policy was applied for and issued in Louisiana.

3. Complainant and assured are and were both citizens of Louisiana (a) when the policy was applied for, (b) when the policy was issued, (c) when the accident occurred.

4. Petitioner, insurer, is a citizen of Illinois and authorized to do business in Louisiana and was such and was so authorized (a) when the policy was applied for and issued, and (b) when the accident occurred.

SUMMARY OF ARGUMENT

1.

The Louisiana direct action statute, which became a part of the contract of insurance when it was written, was enacted to protect the public interest by insuring that liability policies furnish adequate protection to persons injured, as well as protection to the insured.

2.

The Louisiana direct action statute gives to an injured person a new and *substantive* right, not recognized at common law or under Article 2315 of the Louisiana Civil Code (which creates liability for injuries resulting from fault). This substantive right is a distinct and different right or cause of action from that given an injured person to proceed against the tort-feasor under Article 2315 of the Louisiana Civil Code.

3.

The insured is not an indispensable party since the direct action statute confers on the injured party the optional right to sue the insurer alone. The Louisiana legislature has refused to amend the statute so as to *require* that the tort-feasor be joined.

4.

The question presented here had already been authoritatively decided prior to this case by the Fifth Federal Circuit in *New Amstedam Casualty Co. v. Soileau*, 167 F. 2d 767 (certiorari denied by this Court, 335 U. S. 822, 93 L. Ed. 376) and, in effect, has been decided by this Court in *Maryland Casualty Company v. Cushing*, 347 U. S. 409, 74 S. Ct. 608, 98 L. Ed. (Advance p. 519).

5.

This direct action statute does not attempt to give federal courts jurisdiction over controversies between injured Louisiana residents and insurance companies. Such jurisdiction arises only because the United States Con-

gress has provided for such jurisdiction where, in diversity cases, more than $3,000.00 is involved. Where the injured person and the insurance company are citizens of the same state, the statute does not attempt to create jurisdiction in the federal courts. Neither has the Louisiana Legislature attempted to take from foreign insurance companies the right to remove to the federal courts suits brought by Louisiana citizens against such foreign corporations transacting business in Louisiana. Rather, in controversies arising under the Louisiana direct action statute the test of federal court jurisdiction remains as always: Whether there is diversity of citizenship between the plaintiff and defendant, with more than $3,000.00 involved.

ARGUMENT

MAY IT PLEASE THE COURT:

I.

PURPOSE OF THE DIRECT ACTION STATUTE

We cannot better state the purpose of this statute than to quote the language of Mr. Justice Black in passing upon the very same statute in the *Cushing* case:

> "• • • For behind this 'direct action' statute lies a long history of state attempts to protect the public interest by ensuring that liability policies furnish adequate protection to persons injured. At one time insurance companies were commonly able to avoid payment of a single dollar on their policies whenever the insured was insolvent and therefore judgment-proof. The insurance, although bought and paid for, would remain untouched while valid

claims went entirely unsatisfied. To prevent this injustice many states passed laws of one kind or another which required insurance companies to pay injured persons even though the insured had paid out no money. The Massachusetts Supreme Judicial Court took the lead in sustaining a law of this type, Chief Justice Rugg suggesting its need to prevent liability insurance from becoming a 'snare to the insured and a barren hope to the injured.' Lorando v. Gethro, 228 Mass. 181, 189, 117 NE 185, 189, 1 ALR 1374. And, despite the fact that these state statutes wrote compulsory terms and obligations into all insurance contracts, this Court sustained such a statute applying to automobile insurance. Chief Justice Taft said that '. . . it would seem to be a reasonable provision by the State in the interest of the public, whose lives and limbs are exposed, to require that the owner in the contract indemnifying him against any recovery from him should stipulate with the insurance company that the indemnity by which he saves himself should certainly inure to the benefit of the person who thereafter is injured.' Merchants Mut. Auto. Liability Ins. Co. v. Smart, 267 U.S. 126, 129, 130, 69 L. Ed. 538, 542, 45 S. Ct. 320. The Louisiana statute is an application of this same principle. It expresses the public policy of Louisiana that liability insurance exists for the protection and benefit of the injured as well as the insured. Davies v. Consolidated Underwriters, 199 La. 459, 475, 476, 6 So. 2d 351, 357. Under Louisiana's law an individual purchases liability insurance not for himself alone but also for those whom he may injure. This bargain is advantageous to the purchaser because claims against him can be satisfied in suits against the insurer."

The fact that there were 1,340,000 highway deaths and injuries in the United States in 1953 emphasizes the need that an injured person has for a practical remedy when he has been negligently injured in a highway accident.[1]

Other practical reasons for permitting a direct action against the insurer are set forth in an article published in the Wisconsin Law Review.[2]

II.

NEED MET BY CREATING A NEW AND SUBSTANTIVE RIGHT

Faced with the problem of doing something to protect its citizens who were injured due to the negligent operation of motor vehicles on the highways of this State, the Louisiana Legislature enacted this direct action statute. The effect of the statute is summarized in *Miller v. Commercial Standard Ins. Co.*, 199 La. 515, 520, 6 So. 2d 646, decided by the Supreme Court of Louisiana in 1942, when it said:

---

1. Time Magazine, July 26, 1954, p. 15:
"**1,340,000 Casualties.** The President's plan was presented to the 1954 Governor's Conference at Bolton Landing, N. Y. by Vice President Richard Nixon. The need for an up-to-date road system, Nixon said, is dramatically evident in the annual statistics of highway deaths and injuries (1,340,000 in 1953, or nearly 20 times the total casualties in the first year or the Korean war)."

2. "The Insurer as Party Defendant In Automobile Accident Cases," Wisconsin Law Review, Vol. 1953, No. 4, July, at pg. 688. See also, article entitled "Direct Actions Against The Insurer," The Insurance Law Journal, No. 317, June 1949, at pg. 411.

"Act No. 55 of 1930 granted to persons injured or damaged by a motor vehicle covered by insurance against liability a privilege which they did not theretofore have. It gave to them 'a right of direct action against the insurer company' alone, to recover such damages as they may have sustained by the fault of the insured. Under Act No. 253 of 1918, they had no 'right of direct action' against the insurer except in cases where the insured was insolvent or bankrupt. But, under Act No. 55 of 1930, which amended the act of 1918, the injured person or his heirs may in all cases maintain a direct action against the insurer, under the terms and limits of the policy."

Whether the statute is substantive or procedural was debated for sometime in the Louisiana courts; but it seems now finally to be settled, both by the Louisiana Supreme Court and by the federal courts, that this Act created a new and substantive right unknown either to the common law or the civil law as set forth in Article 2315 of the Louisiana Civil Code. A late expression of the Louisiana Supreme Court is found in a decision rendered in 1950, *West v. Monroe Bakery*, 217 La. 189, 191, 46 So. 2d 122, where the Court flatly held that the statute is substantive, saying that it has been treated consistently:

"• • • as conferring *substantive rights* on third parties to contracts of public liability insurance, which become vested at the moment of the accident in which they are injured." (Emphasis by Court)

Likewise, Judge Dawkins, the author of the opinion in the case at bar, in a decision handed down by him in 1951, *(Bayard v. Traders & General Insurance Co.*, 99 F.

Supp. 343, 354,) analyzed a number of the decisions rendered by the appellate courts in Louisiana following the passage of the direct action statute, as well as the decisions by the Fifth Federal Circuit and Federal District Courts in Louisiana, and came to this conclusion:

> "For all of the reasons above recited, I am finally convinced that Act No. 55 of 1930 made a fundamental and substantial change in the right of action under these indemnity policies, or, as they are now called, liability contracts, not confined to procedure or remedy."

And, of course, the Fifth Federal Circuit, in the *Cushing* case, supra, in commenting on this statute, said:

> "Stripped of illusory technicalities, the Louisiana statute merely creates in favor of one who has been wrongfully injured, an additional and cumulative *remedy at law* against an insurer who has agreed to indemnify the *tort-feasor* against liability, by subrogating the injured person to all the rights of the insured within the terms and limits of the policy." (Emphasis by Court)

Despite his earlier holding in the *Bayard* case that direct action statute created a new and substantive right, the trial judge concluded in the case at bar (R. 40):

> "In any event, no matter who he names among these three choices as the party or parties defendant, is the same cause of action which is created by Article 2315 of the Code."

In this conclusion it is respectfully submitted the trial judge erred.

How can it be said that the cause of action against the insurer is the same cause of action that an injured party has against the tort-feasor (even though the tort-feasor must be negligent to permit recovery against his Insurer) when these vital distinctions exist:

1. The action against the insurer is not affected by the insolvency or bankruptcy of the tort-feasor;

2. The action against the insurer is one assumed by it under a contract of insurance voluntarily entered into for a premium;

3. The action against a tort-feasor is based on fault as provided by Article 2315 of the Civil Code — not on contract?

The fact that the cause of action against the tort-feasor is a different one from that given to an injured party by statute against a compensated insurer is made clear by decisions from other jurisdictions where one may not join in the same suit an action in tort with one based on contract. Among these is a decision by the Supreme Court of West Virginia, in *Conwell v. Hayes*, (1927), 103 W. Va. 69, 136 S.E. 604, 605, where the Court said:

"If we give to the language of the indorsement its usual and popular construction, then we must hold that it binds the insurer to direct liability to the injured person whether an action for damages is brought against the assured alone or against the assured and the insurer jointly. This construction, however, does not sanction a joinder of the insurer with the insured in these particular cases. Here,

the liability of the insured is predicated on a tort. The liability of the insurer is based on a contract."

Likewise, to the same effect is a decision by the Supreme Court of Iowa, in *Ellis v. Bruce* (1932), 215 Iowa 308, 245 N. W. 320, at page 323:

"• • • True plaintiff seeks but one recovery. But the liability for the recovery against the tort-feasor is predicated upon his wrongdoing; whereas the liability of the insurance company is predicated upon its contractural undertaking. The two purported causes of action are provable by different evidence. The contractual liability of the insurance company has no probative value to establish the liability of the tort-feasor for his tort. The liability of the insurance company upon its contract is subject to defenses which are in no sense available to the tort-feasor. The insurance policy contains several conditions and qualifications. Proof of compliance with the conditions is incumbent upon the plaintiff. Such proof sustains no relation to the commission of the tort. Though it be true that the commission of the tort by the tort-feasor is a factor in the case of plaintiff against the insurance company, yet the existence of the insurance policy is not a factor in the creation of liability of Bruce for the tort. Such is the general idea underlying the discussing in the Aplin case, though the duality of the causes of action was not challenged therein. We hold that the petition purports to set forth *two* causes of action, and not one." (Emphasis by Court)

Even Judge Rives, in his dissenting opinion in this case, recognized that the cause of action against the insurer is different from the one against the tort-feasor because

when he assumed that if an injured party failed against the insurer he might still sue the insured, said:

> "The judgment in the first suit cannot conclusively estop the injured party *for the issues would be different.*" (Emphasis supplied).

III.

TORT-FEASOR NOT INDISPENSABLE PARTY

The argument is made by petitioner insurance company that the tort-feasor is an indispensable party because, if not joined, the Court's decision would not be binding upon him. (Petitioner's brief, p. 13). But this argument is made without citation of any authority to support it. On the contrary, the Louisiana direct action statute has been construed by the Supreme Court of Louisiana to give the injured person the "optional right" either to sue the insurance company alone or join both the tort-feasor and the insurer. Thus, in *Reeves v. Globe Indemnity Company of New York*, 182 La. 905, 907, 162 So. 724, the Louisiana Supreme Court said:

> "The plaintiff exercised her statutory *optional right* to institute this suit against the defendant alone rather than jointly and in solido against the defendant and King." (assured). (Emphasis supplied).

Likewise, the same Court, in the case of *Miller v. Commercial Standard Ins. Co.*, 199 La. 515, 526, 6 So. 2d 646, said:

> "It is clear, we think, that the word 'may' as used in that clause relates to the *option granted* the injured person of bringing his suit either against the in-

surer company alone or against both it and the insured jointly and in solido." (Emphasis supplied).

Hence, if the injured party exercises his optional right and sues the insurer alone, he waives his right to sue the tort-feasor — he has exercised his option. It is significant, too, that no case is cited by petitioner where an attempt has been made to sue the tort-feasor after an unsuccessful suit against the insurer, despite the fact the statute has been in force for almost a quarter of a century.

As early as 1848 this Court held in *United States v. Hodge*, 6 Howard 276, 283, 12 L. Ed. 437, 440, in construing Article 3045 of the Revised Civil Code of Louisiana, that an action could be maintained in the federal courts of Louisiana against the surety alone without joining the principal, saying:

> "It is insisted that 'the action is brought wrong; and that, if the judgment be reversed, the plaintiffs cannot recover, because of the nonjoinder of Ker as a defendant.'"
>
> "The action against the sureties, omitting the principal, is sustained by the Louisiana Practice. In Maria Griffing, Adm'x, v. Caldwell, 1 Robinson, 15, it was held that a creditor has the right, but he is under no obligation, to include the principal and surety in the same suit. And in Smith, Adm'r., v. Scott, 3 Robinson, 258, it is said a surety, who binds himself with his principal, in solido, is not entitled to the benefit of discussion, and may be sued alone for the whole debt. So in Curtis v. Martin, 5 Martin, 674, it is laid down, that the surety may be sued without the principal."

Furthermore, to require the joinder of the tort-feasor, would not only have the effect of denying the injured person the optional right to sue the insurer alone, but would also deny to the insured one of the advantages of having insurance for, as Mr. Justice Black said in the *Cushing* case:

> "This bargain is advantageous to the purchaser because claims against him can be satisfied in suits against the insurer."

Insurance companies have been unsuccessful in their attempts to have the Louisiana direct action statute amended so as to *require* the joinder of the insured. Senate Bill 73, introduced in the 1952 Session of the Louisiana Legislature for this purpose, died in the Senate Committee; and House Bill 600 to the same effect, introduced in the 1954 Session of the Louisiana Legislature, was defeated on the floor of the House of Representatives by a vote of 63 to 22. It is submitted that this Court should do none other than adopt the same construction of the statute as announced by the Supreme Court of Louisiana: That the insured is not an indispensable party and the injured party has the "optional right" to sue the insurer alone.

IV.

STARE DECISIS

The question here presented was first authoritatively decided by the Fifth Federal Circuit in the case of *New Amsterdam Casualty Co. v. Soileau* (C. C. A. 5th 1948), 167 F. 2d 767, certiorari denied 335 U. S. 822, 93 L. Ed.

376. The *Soileau* case is one of those cited by the Court in the case at bar when it said that

> "Upon principle and authority, and particularly upon that of our cases cited in the note, the judgment was wrong and must be reversed."

The point debated in the case at bar that there is no so-called "actual controversy' between the plaintiff and the insurance company was vigorously urged in the *Soileau* case, but the Court expressly considered and rejected that argument in the following language:

> "The case was tried to a jury and resulted in a verdict against appellant in the sum of $15,000. From the judgment entered upon the verdict, appellant appeals. Appellant contends (1) that the state of Louisiana, in passing Act No. 55 of 1930 permitting the insurer of an insured to be sued directly by an injured person *could not thereby confer jurisdiction on the federal court where the actual controversy is between citizens of the same State;*"

• • • • •

> "Equally without merit is the contention that the court below was without jurisdiction, since the *actual controversy* was one between the insured and the injured party, both citizens of Louisiana.

• • • • •

> "Where the asserted right of action arises by *subrogation* and not by assignment, the *subrogated party may sue on such right in a federal court if there is diversity of citizenship between him and the de-*

fendant, though the original debtor and the defendant are citizens of the same State. City of New Orleans v. Whitney, 138 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102; 2 Hughes, Federal Practice, Sec. 894, p. 148." (All emphasis added).

When application was made to this Court for writs in the *Soileau* case the same language was used in the brief filed in support thereof where it was urged:

"* * * the jurisdiction of the Federal courts based on diversity of citizenship must depend upon the citizenship of the parties to the actual controversy, as determined from the applicable substantive law. * * * *the actual controversy to the determination of which this litigation presents itself is formulated between the respondent on the one hand and Louis O. Campbell on the other, who are both alleged to be residents of the Parish of Evangeline, Louisiana.* * * * the mere fact that there may be diversity of citizenship as between respondent and petitioner is not sufficient to confer jurisdiction on the Federal Courts under the Constitution of the United States and under the diversity provisions of the Judicial Code, 28 U. S. C. A. Sec. 41." (USSC Brief P. 12). (Emphasis added).

Following the decision of the Fifth Federal Circuit in the *Soileau* case and the denial of the application for writs by this Court, litigants continued to avail themselves of the provisions of the Louisiana direct action statute and at least twenty cases were presented to the

Fifth Circuit from Louisiana in which the same argument could have been made.[3] This long array of year after year assumption of jurisdiction should not be brushed aside by the courts. If experience demonstrates the citizens of Louisiana are not entitled to invoke the aid of the federal courts to gain the relief granted them by the laws of the State of Louisiana, then the Congress and not the courts, should make that decision and change the rules regarding jurisdiction in diversity cases.

Except for the fact that writs have been granted in the instant case, we would not hesitate to say that this Court has already conclusively adjudicated the issue here presented in the *Cushing* case, supra, for, as Mr. Justice Frankfurter said in speaking for himself and Mr. Justice Reed, Mr. Justice Jackson and Mr. Justice Burton:

> "We agree with the Court of Appeals that since diversity supports federal jurisdiction, the Jones Act need not be drawn upon for jurisdiction."

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3. Bankers Ind. Ins. Co. v. Green, 181 F. 2d 1, Thibaut v. Car & Gen. Ins. Corp., 181 F. 2d 494; American Ins. Co. v. Walker, 181 F. 2d 497, Great Amer. Ind. Co. v. Cormier, 187 F. 2d 107; Amer. Fire & Cas. Co. v. Jackson, 187 F. 2d 379; Louviere v. Lumbermens Mut. Cas. Co., 187 F. 2d 613; Belanger v. Great Amer. Ind. Co., 188 F. 2d 196; Williams v. Standard Accident Ins. Co., 188 F. 2d 206; Lumbermens Mutual Cas. Co. v. Hutchins, 188 F. 2d 214; Employers' Liability Assur. Corp. v. Lejeune, 189 F. 2d 521; Globe Indemnity Co. v. Stringer, 190 F. 2d 1017; Tauzin v. St. Paul Mercy Ind. Co., 195 F. 2d 223; Amer. Fire & Cas. Co. v. Gresham, 195 F. 2d 616; Lejeune v. Midwestern Ins. Co. of Okla. City, 197 F. 2d 149; Texas Mutual Ins. Co. v. Curtin, 197 F. 2d 617; Gillen v. Phoenix Ind. Co., 198 F. 2d 147; State Farm Mut. Auto. Ins. Co. v. Scott, 198 F. 2d 152; Fisher v. Home Ind. Co., 198 F. 2d 218; Cushing v. Maryland Casualty Co., 198 F. 2d 536.

In the same opinion Mr. Justice Black, in speaking for himself, the Chief Justice, Mr. Justice Douglas and Mr. Justice Minton, said

> "I agree with the Court of Appeals for the Fifth Circuit that the insurance companies' contentions 'overinflate a relatively simple proposition with apparent, but unreal, technical problems.' 198 F. 2d 536, 539."

And Mr. Justice Clark, in a concurring opinion, said:

> "I see no necessity for invalidating Louisiana's law by dismissing these direct actions."

On June 8, 1954, this Court dismissed the appeal in the case of *National Surety Corporation v. Louis Wilburn McDowell*, Docket No. 716, 98 L. Ed., (Advance 724) 68 So. 2d 189 for want of a substantial federal question. This was an appeal taken from the Court of Appeal of Louisiana, First Circuit, wherein the contention was made that the direct action statute was unconstitutional in that it denied Petitioner equal protection of the laws and of its property without due process of law.

V.

REGARDING SOME OF PETITIONER'S CONTENTIONS

With utmost respect it is submitted that the reasons given by Petitioner for the granting of the writ in this case and by Judge Rives in his dissenting opinion in the case at bar, are arguments which should be made to the Congress in seeking a change in the judicial code whereby

the federal courts are granted jurisdiction to hear diversity cases. It is argued that the federal court is divested of of jurisdiction to hear and determine this cause because of the number of cases which have been filed by Louisiana citizens in the federal court. However, the late Judge Porterie gave a short answer to this argument in *Lewis v. Manufacturers Casualty Ins. Co.*, W. D. La. 1952), 107 F. Supp. 465, 473, where he said:

> "The jurisdiction of this Court is not governed by statistics, or the momentum of cases here."

And, as was said in one of the decisions cited in Petitioner's brief at page 23, *Steinberg v. Toro*, 95 F. Supp. 791, at page 795 (D. C. Puerto Rico):

> "Congress, in conferring jurisdiction upon the federal courts to entertain suits between citizens of the the different states intended that when a citizen of one state sought to enforce or protect a right against a citizen of another state, he should be entitled to invoke the jurisdiction thus conferred upon the federal courts as a matter of right. When a suitor comes within the requirements of diversity jurisdiction, he should be able to successfully invoke it, whatever his reasons, and a refusal to exercise jurisdiction in such cases would thwart the very purpose for which such jurisdiction was conferred."

It is also argued that the purpose of diversity was to afford protection to non-residents who might be unable to get a fair trial in the State court. The effect of this argument is to say that the federal court should have jurisdiction only when a non-resident elects to invoke it, although

admittedly Congress has given the same election to a Louisiana citizen as is given a citizen of any other State. What would be fair about a rule that would permit a foreign insurance company, if sued in the state court, to remove it to the federal court, but deny a Louisiana citizen the right initially to bring suit in the same court? And it seems to us a little late for foreign insurance companies to be arguing at this time that they are unable to secure a fair trial in the federal courts. They argue in one breath that Congress has passed the diversity statute to insure non-residents fair trials; and yet, at the same time argue that they are being crucified in federal court trials where the plaintiffs invoke the jurisdiction of such courts! But, as stated by Judge Porterie in the *Lewis* case, supra:

> "Defendent urges that the state court with jurisdiction of this case is a fair court; besides not saying that this is also a Court of Justice, defendent forgets that plaintiffs are not only citizens of Louisiana but also are citizens of these United States."

It is also argued in Petitioner's application to this Court for writs of certiorari that if Louisiana citizens are allowed to institute these actions directly against foreign insurance companies alone, the biased and prejudicial advantages which they will enjoy will substantially increase the loss experience of the insurance companies in the State of Louisiana. There is no proof in the record that such will be the ultimate result. In fact, on April 14, 1954, at least one insurance company was granted permission by the Louisiana Insurance Rating Commission to reduce its

rates by 25% from the rates promulgated and published by the Casualty and Surety Division of that Commission.[4] In granting this application the Commission had this to say:

> "The Company has demonstrated through its dividend payments of 20%, out of the ordinary mandatory premium charges, that it is capable at least for the next 12 months of collecting 25% less than the manual rate and still survive financially.
>
> "The dividends paid in Louisiana and the operation of the Company here and elsewhere, as testified to by the numerous witnesses of Applicant, convinces the Commission that the Applicant is in a position to pass on to their Louisiana policyholders a 25% saving in the total cost of their insurance, and, in view of the denial of the membership fee plan, the application for a 25% deviation is granted."

While it may be argued that the State Farm Mutual is in a position to make this rate reduction while other insurance companies are not, because it uses more care in selecting its insured, the Louisiana Insurance Rating Commission made one significant statement regarding the

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4. Decision of the Louisiana Insurance Rating Commission in the **Matter of the Application of State Farm Mutual Automobile Insurance Company of Bloomington, Illinois** (certified copy of this decision has been delivered to the Clerk of this Court). In the same opinion the Rating Commission denied applicant's request that it be permitted to charge and collect a membership fee. This portion of the decision is under attack in the case of **State Farm Mutual Automobile Insurance Co. v. Louisiana Insurance Commission, et al.**, No. 49, 480, 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana.

cost of automobile casualty insurance in Louisiana when it said:

> "As a matter of fact the insuring public of Louisiana has fared extremely well under the formula and the rating system of the State. It was pointed out by the Chairman during the course of this hearing, that a survey of staff technicians disclosed that in the Baton Rouge area *costs to policy holders for private passenger automobile insurance since 1940 has increased only 42%, as compared with increases of 147.1% in labor and 91.4% [in cost] of living generally.*" (Emphasis supplied).

CONCLUSION

It is therefore respectfully submitted that the opinion and decision of the Fifth Federal Circuit in holding that the District Court for the Western District of Louisiana has jurisdiction to hear and adjudicate this cause is correct and should be affirmed at petitioner's cost.

Respectfully submitted,

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